



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

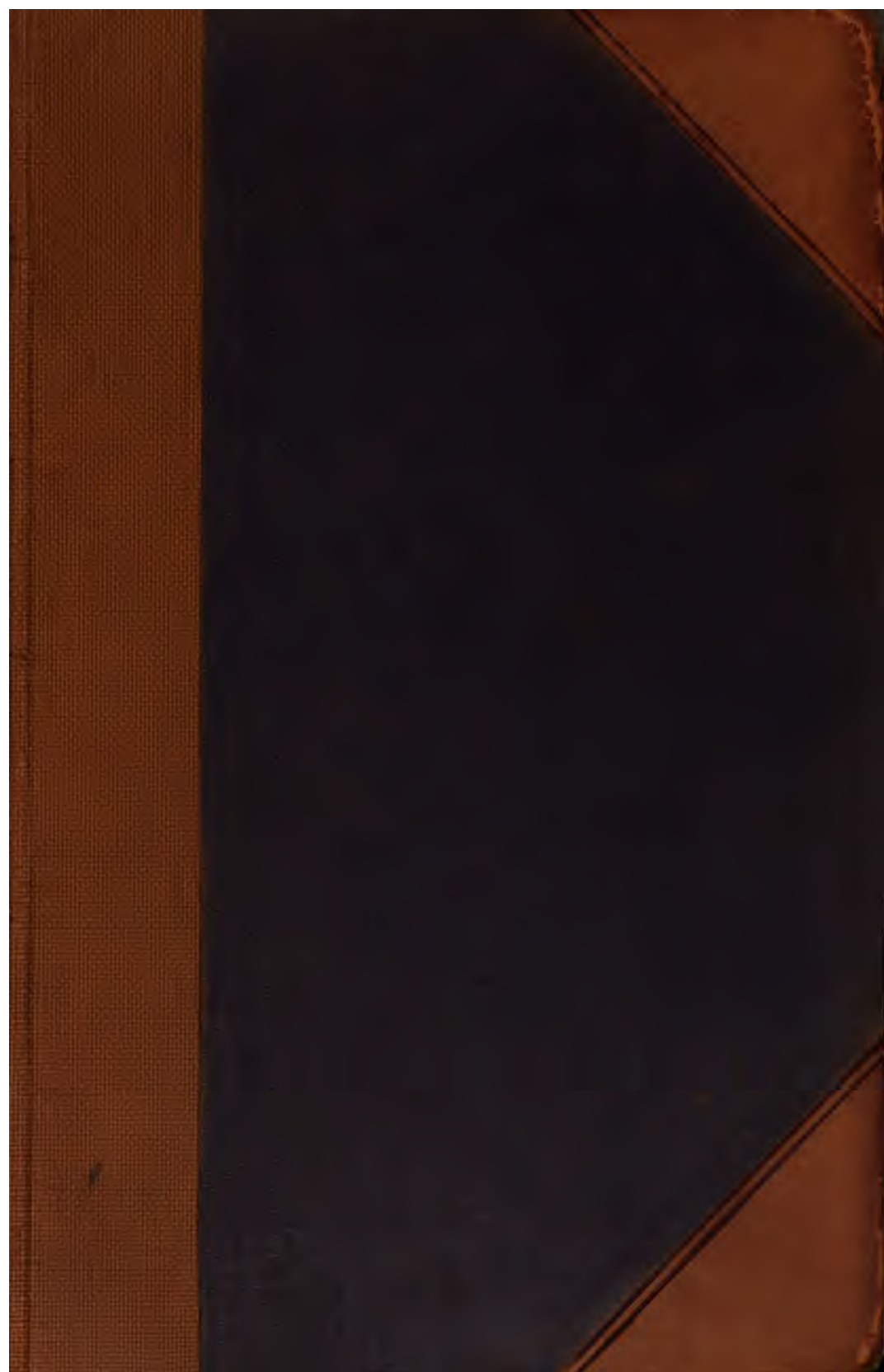
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



Per h. Gen A B. d. 48 <sup>1869-70</sup>

CW UK

300

L. 200









THE  
LAW MAGAZINE

AND  
LAW REVIEW;

OR,  
*Quarterly Journal of Jurisprudence.*

---

AUGUST, 1869, TO FEBRUARY, 1870.

---

VOLUME XXVIII.



LONDON :  
BUTTERWORTHS, 7, FLEET STREET,

*Law Publishers to the Queen's Most Excellent Majesty.*

EDINBURGH: T. & T. CLARK, AND BELL & BRADFUTE.

DUBLIN: HODGES, SMITH, & CO.

MELBOURNE: GEORGE ROBERTSON.

CAPE TOWN: SAUL, SOLOMON, & CO.

---

1870.

LONDON:

PRINTED BY W. W. HEAD, VICTORIA PRESS, 11, 12, & 13, HARP ALLEY,  
FARRINGTON STREET, E.C.

INDEX TO VOL. XXVIII.  
OF THE  
**Law Magazine and Law Review.**

---

Events of the Quarter; &c., 163, 368.

Exemption of Private Property on the Ocean, 216.

Foreign Debtors in England, 18.

Imprisonment for Debt, 29.

Life Assurance, 193.

Naturalization and Allegiance, 109.

Necrology, 191, 389.

Notices of New Books, 150, 347.

On Primogeniture, 11.

On the Turnpike System, 68.

On Reform in the Law of Patents, 83.

Recent Decisions in Scotch Court of Session on General  
Points of Law, 137.

Rights of Colonial Legislatures, 117.

- Sanitary Law, 345.  
Slander, 294.  
State Appropriation of Railways, 129.  
Suggestions for the Irish Land Bill, 48.  
  
The French Bar, 325.  
The Charters of the City of London, 261.  
The City Courts, 208.  
The Land Question, 230.  
The Law of Limitation, 298.  
The New Bankruptcy Act, 276.  
The Penal Code of New York, 1.  
The Works of George Coode, 318.  
Trades' Union Legislation, 303.
-

THE  
**Law Magazine and Law Review :**  
OR  
QUARTERLY JOURNAL OF JURISPRUDENCE.

---

---

No. LV.

---

---

ART. I.—THE PENAL CODE OF NEW YORK.

*By* T. L. MURRAY BROWNE.

IN our last number we gave some account of the Codes of New York. We stated the circumstances which gave them birth, explained their general character, and commented at some length upon one of their number, namely, the Code of Civil Procedure. We propose now to examine, in some detail, another of the same series of codes—The Penal Code.

Our readers may remember that this Code was drawn up by a commission appointed by the Legislature of New York, Mr. David Dudley Field being the most prominent of the commissioners. The Code in question was reported complete to the Legislature in 1865 ; but has not become law. It is of no inordinate length, being comprised in one large octavo volume. The Code is divided into nineteen titles, preceded by a few preliminary provisions. These titles are, where necessary, subdivided into chapters. The entire work is comprised in 1070 sections, of a few lines each, which are numbered consecutively from the beginning

to the end of the work. Short notes and references to existing authorities, are appended to many of the sections.

The difficulties which beset codification in any form are great; but a Penal Code is perhaps less difficult to construct than any other. Criminal Law, when we exclude the law of evidence, is *comparatively* simple. It is also necessarily of limited extent. A moment's consideration will show this. The number of existing treatises on the Civil Law, and even on the Civil Procedure of this country, is immense, while with very few exceptions everything that can be known on the subject of Criminal Law, is comprised in the one volume of Mr. Archbold's well known work. The same conclusion follows from a consideration of the number of nations which possess a Penal but not a Civil Code—a list which comprises most of the principal continental nations, together with our own Indian Empire. In codification, the real tug of war begins when we approach the preparation of a Civil Code. A Penal Code may be called, by comparison, an easy task. Nevertheless, the construction even of a Penal Code is sufficiently difficult, and presents abundant obstacles to success. These obstacles the New York Commissioners have skilfully overcome. The Penal Code is perhaps the best of the codes prepared by them; and though hardly equal to such a masterpiece of legislation as the Indian Penal Code, it yet constitutes a work not unworthy of the great State, under whose auspices it has been produced.

As we have said, the Penal Code has not yet been adopted by the Legislature of New York. It has not therefore become law. Inasmuch, however, as its provisions, with a few exceptions, are mere embodiments of the substance of the existing law, the Code presents us with a very fair exposition of the *existing* criminal law of New York. In fact, though not yet in force as a code, it already serves the purpose of a digest.

In a code, arrangement is of course a most important

feature. In an ordinary Act of Parliament we may excuse an imperfection in this respect; but, in a code, which aspires to the rank of a scientific composition, we are entitled to expect better things. Our readers, may, perhaps, desire to have the means of judging for themselves, how far the Code before us deserves commendation upon this score. We subjoin, therefore, a very brief summary of its contents, arranged in the order in which they occur in the original.

The Code commences with a brief introduction, comprising fourteen sections. This is followed by titles I. and II., which deal respectively,—with the “persons liable to punishment for crime” and with “parties to crimes.” The following subjects then follow in six successive titles: (III.) Crimes against Religion; (IV.) Treason; (V.) Crimes against the Elective Franchise; (VI.) Crimes against the Executive; (VII.) Crimes against the Legislative Power; and (VIII.) Crimes against Public Justice. The last title (VIII.) includes escapes, perjury &c. Title IX. deals with crimes against the person, (including libel) and title X. with “crimes against the person, and against public decency and good morals,” under which description are placed offences against women and children, indecency, gaming, pawnbroking without a license, &c. Title XI. is styled “Of other Injuries to Persons” and includes (amongst a variety of miscellaneous items) counterfeiting trade marks, usury, mismanagement of steam-boilers, &c. The division in this part of the Code seems to be confused. It would appear a more natural arrangement to place such crimes as rape, which at present are included in title X., under the general head of offences against the person, leaving indecency and gambling to appear under a separate title as offences against public decency and morals. The misdemeanour of pawnbroking without a license, which is also included in title X., seems to have got altogether out of its place. Moreover the heading of title XI., “Other Injuries to Persons” is a very awkward phrase in such a position,



and it is difficult to ascertain precisely in what sense the word "persons" is here used. A similar confusion appears to prevail amongst the subjects included in the title thus designated (XI.). For instance we should have thought that "counterfeiting trade marks" was clearly an offence against property, and "mismanagement of steam-boilers" a crime against public safety, which should therefore find a place in title XII. But to continue. The three following titles (XII. XIII. and XIV.) treat respectively of Crimes against the public health and safety, Crimes against the public peace, and revenue offences. Title XV. comprises the extensive subject of Crimes against property; and, is followed by a title (XVI.) dealing with malicious mischief.

Here again we are unable to understand the principle upon which the arrangement of the sections is founded. We should have thought that the subject of "malicious injuries to railroads, telegraphs," &c., came under the description of "malicious mischief," and should have been placed in Title XVI. Yet we find it in Title XV., under the head of injuries to property. It is thus separated from the kindred subjects of "malicious injuries to freeholds," to standing crops, &c., which are properly ranged under Title XVI. Nor is this the worst. Under the head of malicious injuries to railroads, we find an enactment (sec. 691) that if a railroad be obstructed, and the death of a human being be thereby caused, the offender shall be punishable with four years' imprisonment. Surely the Title dealing with offences against property, with which we are now concerned, is about the last place in which one would look for a provision of this kind. It should be placed either under the head of crimes against the person, or under that of malicious mischief. The arrangement of the Code is certainly imperfect in this respect. Title XVII. comprises miscellaneous crimes, and Title XVIII. certain general provisions. The concluding Title, which composes nearly

one-third of the whole book, is devoted to prison discipline, and contains a series of elaborate and minute provisions for the management of gaols.

The general system and character of the Code will appear from the above review. We have next to draw attention to the mode in which it deals with former Penal Statutes, which is somewhat remarkable. These Statutes constitute, of course, a vast mass of legislation, which is superseded by the Code. Yet there is no general repealing clause, such as we are accustomed to see in English Acts of Parliament. Indeed few, if any, laws are expressly repealed at all. The reason given by the Commissioners for taking this course is, that, in numerous cases, penal enactments are so intermingled with provisions relative to civil rights and remedies, that there would be great danger in attempting to disentangle them. They have therefore adopted the following course. They provide by sec. 2, to be quoted below, that from the time when the Code takes effect, no person shall be punished *criminally, except* as provided by the Code or by some Statute, which the Code *expressly* specifies as continuing in force. Then in sec. 786 they enumerate the Statutes (mostly of a special or local character) which are intended to be continued. The effect is that, while other Statutes will remain unrepealed and in full effect, so far as civil rights and remedies are concerned, courts of criminal jurisdiction will be forbidden to enforce them, in so far as, before the adoption of the Code, they authorised criminal punishments.

We are now in a position to cite the opening sections of the Code:—

#### “ PRELIMINARY PROVISIONS.

“ § 1. This Act shall be known as the ‘PENAL CODE OF THE STATE OF NEW YORK.’

“ § 2. No act or omission commenced after the day on which this Code shall take effect as law, shall be deemed criminal or punishable except as prescribed or authorised by this Code or by some of the

Statutes which are specified in sec. 786, as continuing in force. Any act or omission commenced prior to that day may be enquired of, prosecuted and punished, in the same manner as if this Code had not been passed."

It will be observed that this section abolishes all common law offences.

"§ 10. The rule of the common law that penal statutes are to be strictly construed has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice."

As a further specimen of the language of the Code, we may cite the definition of the crime of bigamy.

"TITLE X.

"CHAPTER V.

"§ 338. Every person who, having been married to another who remains living, marries any other person, except in the cases specified in the next section, is guilty of bigamy.

"§ 339. The last section does not extend to any person by reason of any former marriage whose husband or wife by such marriage has been absent for five successive years without being known to such person within that time to be living; nor,

"2. To any person by reason of any former marriage whose husband or wife by such marriage has absented himself or herself from his wife or her husband and has been continually remaining without the United States for the space of five years altogether; nor,

"3. To any person by reason of any former marriage which has been pronounced void, annulled, or dissolved by the judgment of a competent court unless such marriage was dissolved upon the ground of adultery committed by such person; nor,

"4. To any person by reason of any former marriage with a husband or wife who has been sentenced to imprisonment for life."\*

---

\* It may be interesting to compare the corresponding provisions of other Codes.

"INDIAN PENAL CODE, CHAPTER XX. S. 494.

"Whoever, having a husband or wife living, marries in any case in

It is hardly within our province to review the criminal law of New York, as distinct from the Code, which is its expression. We shall venture, however, to make a few remarks upon the subject, premising that in all the cases hereafter mentioned, the Code does but embody the existing provisions of the American law.

In the first place, then, we observe, that the distinction between felony and misdemeanor is maintained by the Code. At the same time the offences coming within the two classes have been entirely re-arranged. This portion of the English

which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished, &c.

*Exception*—This section does not extend to any person whose marriage with such husband or wife has been declared void by a court of competent jurisdiction: nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife at the time of the subsequent marriage shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts, so far as the same are within his or her knowledge."

**"CODE NAPOLEON.—CODE PENAL, S. 340.**

"Quiconque étant engagé dans les liens du mariage en aura contracté un autre avant la dissolution du précédent, sera puni," &c.

**"CODE OF CRIMES AND PUNISHMENTS OF LOUISIANA.**

Art. 577. "A person having a wife or husband living, who shall, without having reasonable cause to believe such wife or husband to be dead, contract a second marriage, is guilty of bigamy."

The Code of Lower Canada, being a Civil Code only, contains no similar provision. The following is the definition of bigamy given by the English Law:—

24 & 25 Vict., c. 100, sec. 57—"Whosoever, being married shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England, Ireland, or elsewhere, shall be guilty of felony.

"Provided that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who at the time of such second marriage shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."

law is very defective. Many offences are by our law classed as misdemeanors which should undoubtedly be felonies, and *vice versâ*. The American Legislature has corrected this defect, and has drawn the line between the two classes of crimes with a juster hand.

We are not in the habit of considering the New Yorkers as a very strait laced community. Yet it is remarkable in how many cases moral offences, to which our criminal law does not extend, are prohibited by theirs. Thus sections 38—51 of the Code forbid Sabbath breaking; under which head almost every kind of Sunday travelling is included. Again, seduction under promise of marriage is in New York punishable by five years' imprisonment. So also is incest. In like manner betting or gaming to the amount of twenty-five dollars, bribery, treating, intimidation, and even the carriage of voters to the poll are all criminal offences. The existence of a state of society more lawless than our own is indicated by a provision (sec. 453 of the Code) which makes it a misdemeanor to carry, and even to manufacture or sell, "slung shot."

The most curious provision in the Code is that against birds-nesting. This particular species of sport is not, indeed, universally forbidden, but only when practised in cemeteries. Birds-nesting in cemeteries is, however, prohibited with much stringency (sec. 702); the penalty extending even to the sale or purchase of any bird so captured. The reasons upon which this peculiar species of game law is founded do not appear—unless, indeed, the Legislature had the fate of the Wild Huntsman before their eyes.

Two points in the New York law are especially noticeable with regard to the Habitual Criminals' Act of the last session. It will be remembered that the design of that Act was to embody and enforce the general principle, that the punishment of an offender should increase in proportion to the number of his previous convictions. In the state in which the Bill passed the House of Lords it contained a provision

that, on a third conviction for felony, the sentence should not be *less* than seven years' penal servitude. Unhappily this section was struck out by the House of Commons; and thereby the Bill was shorn of its most useful and valuable provision. Had the section in question been allowed to stand, it would have constituted the first example in our law of what may be styled *minimum* terms of imprisonment. It appears, however, that both the above features of jurisprudence have long been recognised by the law of New York. Both, for instance, appear in the following section of the Code, which may well be compared with the corresponding provisions of the Habitual Criminals' Act.

"§ 748. Every person who *having been convicted* of any offence punishable by imprisonment in a State prison *commits any crime after such conviction* is punishable therefore as follows :—

"1. If the offence of which such person is subsequently convicted is such that upon a first conviction an offender would be punishable by imprisonment in a State prison for any term exceeding five years, such person is punishable by imprisonment in a State prison for a term *not less than* ten years.

"2. If such subsequent offence is such that, upon a first conviction the offender would be punishable by imprisonment in a State prison for five years or any less term, then the person convicted of such subsequent offence is punishable by imprisonment in a State prison for a term *not exceeding* ten years.

"3. If such subsequent conviction is for petit larceny, or for any attempt to commit an offence which if committed would be punishable by imprisonment in a State prison, then the person convicted of such subsequent offence is punishable by imprisonment in a State prison for a term *not exceeding* five years."

As for *minimum* terms of imprisonment, they are of frequent occurrence in the Law of New York. For instance—

§ 324. "Rape in the first degree is punishable by imprisonment in a State prison *not less than* ten years."

§ 325. "Rape in the second degree is punishable by imprisonment in a State prison *not less than* five years."

The crimes of forgery, robbery, burglary, and others, furnish similar instances.

We cannot quit the Penal Code without calling attention to the very valuable information to be found in the Appendix A thereto. This Appendix contains a summary of the principal Penal Codes of the continent, viz., those of France, Prussia, Austria and Russia, Saxe Weimar, Baden, Switzerland, Sardinia, Turkey, Belgium and Spain. To which may be added Feuerbach's Penal Code for Bavaria. To comment upon these would be out of place in the present article. We must content ourselves with repeating the expression of our obligation to the New York Commissioners for giving this valuable information to the world.

It is difficult to conclude this article without a passing reference to the kindred subject of the Indian Penal Code. This great example of scientific legislation was, as our readers may remember, drawn up many years ago by an Indian Commission, of which Lord Macaulay was a principal member. Like the New York Penal Code it was allowed to slumber for a length of time in inactivity, but has been recently drawn from its pigeon-hole by the present Indian Code Commission, and under their auspices has become law. It has therefore been subjected to the crucial test of actual practice, which, as our readers will remember, is not the case with the kindred American Code. This trial has only proved the excellence of the Indian Penal Code. We are informed upon good authority, that it works admirably. This Code should not be confounded with the *Civil Code* of India, which has a different history. As we have already mentioned, the Penal Code was drawn up, in part at least, by Lord Macaulay ; but no attempt was then made to construct a Civil Code. However, a Code of the latter description is now in process of construction under the auspices of the Indian Code Commission. One division of this, comprising the subject of Succession to the property, &c., of deceased persons, is already complete and is actually

in force. It forms the recent Succession Act of India. A second division, treating of contracts, has been drafted, and is now under consideration. We cannot now enter into a detailed review of the Indian Codes; but we may be allowed to express our admiration both of the Penal Code, and of such portions of the Civil Code, as are now in existence. We should be most unwilling to depreciate the value and excellence of the New York Codes. At the same time our own opinion is clear; and we may venture to express a hope that the Indian rather than the American Codes will be regarded as the model for the future legislation of this country.

---

## ART. II—ON PRIMOGENITURE.

THE measure which Mr. Locke King has introduced into Parliament, having for its object the assimilation of the law of descent of freehold estate to that which governs the succession to personal property—in other words the abolition of the custom of primogeniture—may render some explanation of the question useful to our readers; and this, less by way of controversy on a subject which is one of admitted difficulty, than in order to aid in forming a correct opinion on a matter which comes near to the interests of a large section of the community.

I. It is then in the first place material to bear in mind that there is a very large class of interests in lands which, as not coming within the strict meaning of “real estate,” is now, and from the most ancient period in our legal history has been, subject to the same law as that which regulates the title to personal property, and which is therefore free from the objections which, be they real or fancied, are considered to attach to the descent of freehold, “or as the



lawyers term them "fee simple," estates.\* These are well known as leases for terms of years of any duration whatsoever, short or long, from one to 999 years. If the owner of this kind of property dies intestate it is divided amongst his next of kin in the proportions settled by the well-known Act called the Statute of Distributions,† as if it was so much money or goods, a system remarkable for its fairness. With respect therefore to this class of interests in land, no objection can be made as to the proportions in which it is divided amongst those who are entitled to succeed an intestate owner; in other words primogeniture, as a consequence of law, has no bearing on leasehold estate. The large districts, or parcels of land, in which so much money is invested are divided—or the value of them—amongst the widow and children or the near relatives of the intestate. He may of course by his act give the entire estate to his eldest or any other son, as he may give it to a more remote relative, or to one who is no relative at all. But this is not the act of the law, nor is properly chargeable as a defect in our legal system; it results simply as a consequence of ownership.

The rule—or custom as it may more properly be termed—of primogeniture as an act of law distinct from the act of the party, which operates, generally speaking, on small estates held in fee simple, and then only in cases of intestacy, has it will be seen, but little if any bearing on the excessive accumulation of land in the possession of individuals, to

\* The term "freehold" it may be observed, which is in such general use, was in its original meaning such an estate as a free man would deem worth the holding; and therefore in early times denoted an estate for life merely. The modern idea annexed to the terms "freehold" or "freeholder," signifies the whole extent of the fee: the entire interest that is, which a man can have in lands.

† This is the Act—or Acts rather, for there are two—22nd and 23rd Car. II. and 1 Jac. II. cap. 17. They were originally taken from the Civil Code, having their origin in the 118th Novel of Justinian; a source which Sir W. Blackstone (Com. ii. p. 516) is unwilling to admit, although Lord Holt and Sir J. Jekyll in former, and Chancellor Kent in modern, times (Com. vol. i. p. 191) have declared that the Statute was, as they expressed it, "penned by a civilian," and to be governed and construed by the civil law.

which exception is taken as being an enjoyment of property so aggressive as to create an evil which the Legislature should interpose to remove, or at least to mitigate. Such undue accumulation arises from the acts of parties availing themselves to the fullest, and perhaps to even a vicious extent, of the power which they enjoy, and which as incident to ownership may or may not be exercised, of limiting estates so as to run, as it were, in a certain groove and be taken out of the track of commerce for a period, speaking generally, of twenty-one years beyond a life or any number of lives in being: and of tying up rents and profits for a lesser though still a considerable period. Such powers are, it is obvious, wholly unconnected with, and are indeed in their origin directly opposed to, what is known as the custom of primogeniture; a right which, supposes the owner of the estate *wholly to abstain* from the exercise of any disposing power over his property, and to leave it by the negative act, as it were, of dying intestate, to the law to settle the course of descent; in other words, to the operation of the custom under which the estate goes to the eldest son to the exclusion of all other descendants.

Two things, therefore, are to be kept clearly distinct if we would form an accurate opinion on the merits of this controversy. One is the entire exemption of leasehold interests in land from the custom of primogeniture; and the other is, that the rule itself is an act of law, a consequence of intestacy, as opposed to an act of the party, the owner of the estate. That law, as it at present stands, will indeed give the estate to the eldest son to the exclusion of his brothers and sisters, provided the owner, before his death does no act to disturb its effect by such a procedure, as making his will, or executing a deed of gift; but the influence of this law is, for the reasons we have already stated, comparatively restricted and exceptional. In fact, primogeniture, as a feature in our law of real property, is kept alive and perpetuated by the voluntary acts of individual owners. The evils which spring

from the prevalence of this custom arise from the settlors and testators themselves, who, while still in the enjoyment of their property, and in the exercise of what are considered as the legitimate privileges of ownership, choose of their own will, and tax to the utmost the skill and ingenuity of lawyers to secure, that their land shall be so settled as to devolve in a fixed and certain channel to the furthest limits which Acts of Parliament and the decisions of courts will allow. And hence it may be inferred that the allowed partiality for limiting estates to the eldest son is more than a mere consequence of defects in our system of law, or an exceptional employment on the part of testators of the privileges which that law confers. It has a deeper root in the nature of the English people and their attachment to the soil; the desire to become holders of land, and to found a family which shall inherit it. These motives are so powerful that, as is well known, every Act of Parliament which has been passed to encourage the alienation of land and to place it *intra commercium* earlier than would otherwise be the case, has been eluded and sometimes wholly set aside by the ingenuity of lawyers, who, instructed by testators—not unfrequently persons of obscure origin who have acquired wealth in trade—frame conveyances which have the effect of settling property to the utmost limits which an artificial and strained construction of the existing law will allow, and quite opposed to, nay, almost in fraud of, the intention of the Legislature.

II. It will be seen therefore that the measure proposed by Mr. Locke King will be very restricted in its operation, and can have comparatively but slight effect in checking the excessive accumulation of land in the hands of individual owners; which is supposed popularly to be the chief evil attached to the custom of primogeniture. In what way then it will be asked can we best deal with that tendency which leads men to acquire and entail land, and which in these days so much occupies the attention of economists and statesmen? For unless the difficulty is now fairly examined, and if possible solved,

without violent or undue interference with proprietary rights, a solution of this problem, attempted at a future time and under less favourable conditions, may be attended with grave results. The remedy will probably be best found in the imposition of additional restraints on that power of testamentary alienation of real estate which seems in modern times to have reached an excessive growth. For in truth if we examine the matter, the conception of a will, especially as known to English law and English lawyers, and viewed as a method of transferring property, is one of the most artificial of all possible ideas. That a man should have during his life and while his faculties remain to him, the fullest control over what he possesses as long as such control is not at variance with public policy, seems just and right; although the Roman law, it is worthy of note, which is the most perfect model of philosophical legislation, went further than the English system in placing limits on what at the present day would be considered as a reasonable exercise of the right of ownership and testamentary capacity. But that a testator should have the power, simply at his caprice, to impose restrictions on the enjoyment of property for years after he is in his grave, and in favour of persons of whose very existence he is ignorant, and of whom it is doubtful whether they will ever come into being at all, seems *ultra vires* in the highest sense of the words. It is here, far more than in other branches of the law, that the highly technical character of the English law of real property is seen. For while bequests of personal estate, that is to say, money, chattels, leasehold interests, &c., are dealt with in the larger and more equitable spirit of the civil law, with reference to which every will of personal property is expounded, and from which the law governing such instruments has been derived, devises of real estate, that is freehold interest in the land itself, rest on principles having their origin in the feudal law, in the light of which they are still interpreted. The differences between these two classes of instruments may simply be stated thus: a will of personalty is regarded as the expression

of the last wishes of a testator as to what he desires should be done with his personal estate ; and accordingly in this class of instruments certain fixed limits, arising partly from the nature of the property itself and partly from the source from which the law that regulates it is taken, have from the earliest times in our legal history been imposed, which the testator is not allowed to transgress. But wills of *real estate* are not in contemplation of law regarded as testaments at all in this sense, but are viewed and construed as immediate conveyances, documents of title—the fact of death being as it were eliminated—operating to transfer particular lands to a particular devisee, subject to all the limitations and conditions by which the caprice or vanity of the settlor or testator may choose to fetter the enjoyment of the lands granted or devised.

III. The amendment needed, therefore, is in the law of testate rather than of intestate succession ; and the reform should be made to include those cases where property is limited by instruments other than wills, such as, for instance, marriage settlements. Further, the law which regulates the limit during which the *corpus* of an estate can be tied up should be assimilated to the period during which the accumulation of rents and profits is permitted. But the chief step should be in the direction of restraint on the excessive power of alienation now enjoyed, by preventing as well the estate itself as the rents and profits issuing thereout from being settled or devised so as to accumulate for any period longer than the survivor of three lives in being at the same time. This period is analagous to that allowed by the Roman jurists ; \* it is already familiar to lawyers as a not unreasonable restriction upon dispositive powers ; it would, it is believed, not be unfair towards the tenants either for life or in remainder under existing limitations, while it would have the effect of enabling the owner to make the land an article of commerce one generation earlier than is now the case.

\* See Justinian's Institutes, Bk. ii., tit. 16. Maine's Antient Law, p. 227.

Another point—which can here be noticed only in outline—deserves attention as bearing upon this difficult and interesting subject. In cases of intestate succession the descent of real estate to distant heirs and the devolution of personalty to distant kindred, commonly involves, as has been remarked by a learned writer, an amount of litigation, the abolition of which would be desirable. In these cases, while the claims of those who set up a title to the estate are remote, questions are raised of great intricacy, which in many cases lead to property being wasted in protracted and expensive contention. It is open to argument how far—that is to say, extending to what degree of kinship—such claims should be recognised as conferring a title to property at all; especially where, as sometimes happens, the estate or interest devolves unexpectedly upon persons who, from ignorance or other causes, are incapacitated from making a proper use of the wealth which they never at any time had reasonable grounds for regarding as their own. In such cases as these it would seem just that the claims of the public, of the country that is, in which a man has lived, and which has extended to him and his property the protection of its laws, should be held paramount to those of one who, as in the case of real estate, may found his title on his descent from the *most remote* male paternal ancestor of the intestate, or who claims a share in the personalty because he chances to be a survivor of many standing, probably, in the fifth or sixth degree of kindred to the deceased owner.\*

The proposal to apply in these cases the property to State purposes in diminution of public burdens, has the support, amongst others, of Mr. Mill;† and besides the equity of the proceeding itself, it is to be kept in mind that its adoption would inflict no injury on those from whom is merely withheld that which they never looked to enjoy. And as against

\* See Mr. Joshua Williams' work on Personal Property, p. 195, where this view is advocated.

† Political Economy, Vol. I. p. 272.

persons who stand in such a remote degree of relationship to the ancestor, there is also the presumption, arising from his testamentary silence, that if he was not in favour of, he was, at least, not opposed to, the appropriation of his property by the State ; a body which may not unreasonably be considered as having as strong demands on such undisposed-of interests as remote relatives for whom he cannot be shown to have had any partiality, and of whose very existence perhaps he was not even aware.

---

#### ART. III.—FOREIGN DEBTORS IN ENGLAND.

**W**HILE we are engaged, more actively than usual, in improving the local means of administering justice in civil cases, it may be worth while to draw attention to a want which, though occasionally felt somewhat severely, is only felt occasionally ; and so seems likely, just now, to escape attention. We allude to the means, such as they are, by which, at present, we can enforce the payment of debts due by foreigners in Liverpool and in some other important localities : means, to which every successive year is giving additional importance.

It has long been obvious that there is a defect inherent in, and to some extent inseparable from, the system under which justice is at present administered in transactions between the subjects of different governments. This arises chiefly from the practical impossibility of any government stretching its authority, permanently or regularly, beyond the limits of its own territory ; but also, partly, as regards this country, from imperfect legislation. It is to be regretted that this defect, being inseparably connected with the political independence and various character of different governments, cannot be fully remedied, by any means, in

the present state of the world. The inconveniences resulting are, at present, obviated to some extent by legislation, and by international concession; but we believe they admit of being thus obviated to a much greater extent; and this without in any degree impugning the independence of different governments.

To say that every step in advance thus made towards a more perfect administration of justice, as between the subjects of different governments, inasmuch as it would invest with a higher degree of security all the transactions of foreign commerce, and, by thus diminishing risk, diminish cost, could not fail to be beneficial to all parties concerned, is almost needless.

The limits within which we can move must first be marked. Though not very clearly settled, they are obvious enough. The existence of the defect referred to has been recognised by the leading writers on jurisprudence, from the earliest ages down to the present time; and has, by them, invariably been traced, as it may now be traced, to the limits necessarily imposed by the political and judicial independence of separate nations upon the powers of investigation and compulsion wielded by their respective Courts of Law. And it has never been supposed to be practicable, nor can it now be supposed to be so, that the Courts of Law, erected and maintained by one nation, should have jurisdiction within the territory, and over the subjects, of another: inasmuch as the exercise of any such jurisdiction would be directly subversive of the political and legislative institutions upon which the independence of separate nationalities is based.

But we now have to consider not only the necessary extent of the limitations thus imposed upon the enforcement of the laws of one state upon the subjects of another, with reference to the means of enforcing the payments of debts due by, or of compensation for damages sustained at the hands of, the subjects of a foreign power; but also how far the existing limitations are necessary.



The process of law by which a claim, being just, is enforced, is essentially the same in all countries. It is readily divided into two distinct parts:—

I. The investigation by which the justice of the claim is ascertained; and

II. The compulsion by which the right, thus made apparent, is enforced.

As to the first part of the process, there seems to be, substantially, very little difference between the practice of the courts of different countries.

The courts of all countries also more or less readily entertain suits by foreigners against the subjects of the states to which the courts belong; and, in all such cases, they enforce their judgment as they would were the suit at the instance of a native. A similar privilege is accorded to foreigners desirous of suing foreigners in the native courts, where the subject in dispute, or the residence or property of the defendant, or even mutual consent, brings the suit within the jurisdiction of a native court. Of course, these privileges have no existence when the different states in question are at war.

By some writers, this practice of *permitting foreigners to sue* has been treated as founded on a right. It is obvious, however, that, practically, it is based upon concession; and that its just extent is to be measured by international reciprocity. Undoubtedly, the independence of every nation, if strictly insisted upon, implies power to refuse the benefit of its internal institutions to all except its own people. But to use this power to its utmost extent, would be to forbid all intercourse with foreigners. To waive it, so far only as is above stated to be common, is about the narrowest limit of concession consistent with the carrying on of foreign commerce. And it is abundantly evident, apart from all abstract right, that a nation which *seeks* intercourse with foreigners, and promotes the formation of contracts between its individual members and members of other communities, tacitly binds

itself to enforce the fulfilment of such contracts, on both sides, as far as its power may extend.

The suit, once instituted, it appears that the mode of procedure must, with few exceptions, be that usual in the court in which it is carried on. Nor is there any apparent reason why this should be otherwise, except as to *evidence*. There being considerable difference between the force allowed to different descriptions of evidence in different countries, a strict adherence to the course usual in each country might often wear the aspect of a denial of justice, and might, sometimes, deserve that description. The rule most prevalent seems to be that, in this part of the procedure, regard shall be had, in the first instance, to the practice of the country in which the transaction in issue took place; and that, when written documents are in question, they shall be dealt with under the law of evidence prevalent in the country in which they had their origin. And it may be stated in general terms, that the rejection, on any such occasion, of any description of proof commonly recognised by other civilised nations, would be deemed good ground of international complaint.

For our present purpose, however, we have to regard the bearing of the recognised international law of Europe upon a class of cases in which it is necessary to the ends of justice that, *before* any suit is commenced, the property of a foreign defendant, *being within the realm*, should be seized on behalf of a native or foreign plaintiff.

It does not appear that the exercise of such a power, within due limits, is, or ever has been, deemed repugnant to the ideas of international justice hitherto acted upon by the civilized nations of Europe. Nay, such a power is actually in use, by local courts, in some parts of England, and throughout Scotland, and on the Continent. And it seems, in every instance in which we have been able to obtain any authentic account of it, to be founded upon ancient and continuous usage, and to have a distinctly *mercantile* origin.

A statement of its extent and operation, as in use in London and Bristol, will show that for its extension to Liverpool there is ample precedent; and that the precedent is old enough to warrant the assumption that it has been well tried. Nor does there appear to be any valid reason why it should not be extended to every court in the kingdom.

Goods belonging to, or debts due to, foreigners, if the goods or the debtors be within the city of London, may be attached or seized, by process out of the Lord Mayor's Court. This power, which has existed for some centuries, seems to have been originally conferred only by way of compelling the appearance before the court of *persons owing money within the city, but resident out of it*. In effect it often secures the payment of the debt. Property on the Thames is exempt; and hence shipping and goods afloat cannot be there attached. After attachment made, the defendant can remove it by putting in bail for the amount claimed; but, if this be not done for a year and a day, the property attached is delivered over to the plaintiff, or his claim is satisfied out of it. In the meantime, if the plaintiff brings forward two housekeepers, as sureties, to restore the property or debt, if duly claimed within a year and a day, he may have the property appraised and delivered to him, or the debt due to the defendant paid into his hands.\*

A power similar, in many respects, is wielded by the Borough Court of Record, at Bristol, known, before the Municipal Reform Act, as the "Tolzey Court." Its jurisdiction is co-extensive with the city of Bristol, and extends over the Avon as far down as King-road, and over the Severn, as far as the island called the "Holmes;" and so includes all ships and property afloat within these limits. The manner of proceeding resembles that of the London Court. The plaintiff makes affidavit of the amount of his claim. A sum-

\* "*Ashley's Doctrine and Practice of Attachments*, 8vo, 1819," a work relating exclusively to this branch of the jurisdiction of the Court of the Lord Mayor of London.

mons then issues to the defendant to appear. If this be returned with the officer's certificate that he is *not to be found within the city*, an attachment may issue to attach whatever property he may have there. If the defendant does not then appear within a short time, a warrant of sale may issue; and on the plaintiff giving security to return the amount, if the defendant appears, and disproves his claim, within a year and a day, the property is sold, and the plaintiff's claim is satisfied, so far as the proceeds may extend. Here, as in London, the property seizable includes debts due to the defendant, on their being admitted by the debtor, or proved before the Court. If the defendant appears, at any time before the proceedings are completed, and either surrenders his person, or gives bail, the attachment merges in the ordinary action for debt.

A similar customary mode of proceeding exists in some other ancient cities and towns in England; as at Exeter, and at Lancaster; and it also exists in Scotland, and in Jersey, and in nearly all the maritime towns on the Continent of Europe. In Scotland, it is termed "*Arrestment*;" and in France *Saisie arrêt*.

It will be observed, that the power thus used has two distinct peculiarities:—

First: its origin and its form point only to the purpose of compelling the appearance of defendants who, though not within the jurisdiction of the Court, have property and creditors, or debtors and creditors, within it. In effect, by attaching the property or debts of the defendant, the process secures, to their extent, the payment of the plaintiff's claim, if just, or if not disproved.

Second: It operates upon all persons not within the jurisdiction of the Court; and so touches foreigners, *not as such*, but in common with a large number of British subjects.

It remains to be considered how far the exercise of such a general power for the recovery of debts due by foreigners, *and all others who have property or creditors in localities in*

*which they are not resident*, is expedient. If it be so, there seems to be no reason why it should not exist in Liverpool. If it be not so, it can hardly be defended in London, or at Bristol, or elsewhere. Should its existence, for merely local purposes, not be deemed expedient, there still remains the question, whether it may not properly be given to *the supreme courts* of each of the three kingdoms, and even to the local courts of our principal towns, as against foreigners, and others permanently resident abroad.

The process by which the payment of a debt is to be enforced, when the person or property of the defendant is under the jurisdiction of a *foreign* power:—that, namely, by which the claim, having been duly substantiated, it only remains to compel its satisfaction—is of even greater interest. Where the person or property to be acted upon is within the jurisdiction of the Court giving judgment, the process is, usually, precisely the same as though both parties were natives. Otherwise, of course, any enforcement of the judgment must be subject to the goodwill of the foreign power in question.

Now, it is worthy of remark, that though the governments of Europe very generally agree in granting power for the execution of a judgment in such cases, they disagree, widely, as to the terms on which they grant it. And, with reference to these terms, the governments referred to may be divided into two classes:—

- (A.) Those willing to grant the power upon application, backed only by sufficient evidence that the judgment has been duly obtained, according to the law of the country in which it has been obtained, and on condition of reciprocity.
- (B.) Those in which it is required that, before the judgment be enforced, the whole matter in dispute shall be more or less minutely re-investigated before a native tribunal.

The principal modern authorities on international law seem

to be agreed that, subject only to three conditions, a requisition by one government upon another for enforcement of a judgment given by a court of the requiring government ought to be complied with, and might, with justice, be enforced by war.

These conditions are :—

- (a.) That the court giving the judgment shall have had jurisdiction of the matter ; and shall have been so recognised, by agreement, tacit or express, between the two nations.
- (b.) That the foreigner shall have been duly heard, and shall have had allowed all due right of appeal, as though he had been a native.
- (c.) That the case shall have been decided on its merits, according to the law of the country in which it is tried ; and that the decision shall, in that country, be final.

To these it may be added, that no nation could justly claim the benefit limited by these conditions, except on terms of reciprocity.

In acting upon these views of international obligation, the British Government may justly claim to hold an honourable position. Without inquiring about, or stipulating for, reciprocal advantages—without asking for more than ordinary evidence of the competency of the foreign court to deal with the matter, and of the regularity of its proceedings, the courts of this country use all the power they possess to enforce foreign judgments against British subjects, or their property. In fact, we are quite as liberal to foreigners as to each other. A judgment obtained in a Supreme Court of one of our three kingdoms, cannot, without a like preliminary process, be enforced in either of the others.\* Nor could this course, liberal as it is, be objected to, provided it were met by reciprocal action on the part of foreign governments. Unfortunately, however, it is not so.

\* This is scarcely the case since 31 & 32 Vict., c. 54.

On the continent of Europe, as we have stated, there are two prevalent modes of meeting such an application. The more modern (or what, for the sake of distinction, may be termed the *French*) rule, which requires (B) that the subject matter be re-investigated before a native tribunal, prevails in France, in Belgium, and in those parts of Prussia, of Bavaria, and of Hesse, lying nearest to France, and in which the modern legislation of France has been adopted. It also prevails in Holland, in some of the Swiss Cantons, in Geneva, and in the kingdom of the two Sicilies. In Russia, and in Spain and Portugal, the French practice is not expressly adopted, but a foreign judgment is recognised only as evidence, to be used before a native court, in a re-investigation of the case. And it is the same, or nearly so, in Sweden and Norway. The more ancient (or what may be termed the *German*) rule (A) prevails throughout the greater part of that country; in Prussia, excepting the Rhenish provinces, in Hanover and Saxony, in Brunswick and in Baden, in Hesse (except its Rhenish section), in a majority of the Swiss Cantons, in Sardinia, and in the States of the Church. It also prevails in Denmark.

The last-mentioned and more liberal practice is found, by the testimony of the best authorities, to confer considerable advantages upon all the parties concerned. This is precisely what might have been expected. Obstructions to the recovery of debts invariably afford to fraudulent debtors additional motives to the incurring, and to the increase, of debts. It has a converse operation upon creditors: *i.e.*, warning them not to give credit freely; and this warning operates, to some extent, even where fraud is altogether out of the question. The expense and delay of a new trial in the country of the foreign debtor is, in most cases, a mere obstruction of the course of justice; and where the laws and modes of procedure of the two countries are substantially the same, it almost invariably assumes this character. On the other hand, confidence in the authority of his native court,

and the certainty of its being enforced, cannot but induce a corresponding degree of liberality on the part of a creditor dealing with a foreign debtor. Commercial transactions are thus extended, in proportion to the safety of their basis. The foreigner has the benefit of higher credit, the home trader that of larger sales; and both countries profit by an extension of their commercial intercourse.

In the United States of America the effect to be given to judgments obtained in foreign countries is not yet very clearly settled. By the constitution, a judgment obtained in one State is held good in all the others; and it is the same with the judgments of the Circuit Court, when relied upon in the State courts. But it has been decided that this imparts to such judgments only a *general* validity, which may be impeached on the ground of want of jurisdiction, irregularity of proceeding, or fraud. So far, however, as the effect of *foreign* judgments has yet been settled in the United States, the rule adopted has been rather the German than the French—the liberal than the restrictive—one.

It is perhaps hardly necessary to say that, in all these statements, a necessary avoidance of detail has compelled us to overlook many distinctions, and to speak only of the general effects in each case.

As to proceedings *before* judgment, we find that, very generally, on the continent of Europe, in the United States, *in a few places only in England*, and throughout Scotland, the goods and credits of absent persons and foreigners may be attached, in the first instance, so as to secure, to their extent, the ultimate satisfaction of any claim that may be afterwards duly established. The mode, and even the effect, of the proceeding is different in different localities; but, *wherever it exists it is found to be beneficial*; and it does not appear that it has, when fairly employed, been complained of as unjust or unequal in its operation.

So far as it differs from the old English process of execution, (that is to say, as it covers not only the goods but also the



credits of the parties proceeded against) the principle involved has also been adopted into the English law—the Common Law Procedure Act of 1854 (secs. 60, 61) authorising the examination of any person against whom a judgment has been obtained, as to any debts due to him. And upon the evidence afforded by such examination, or upon affidavit of the plaintiff of the existence of any such debt, it may be attached to answer the judgment. Nor does there appear to be any good reason why a preliminary power wielded by the Lord Mayor's Court in London, and the local Courts of Bristol and some other towns in England, and throughout Scotland, assuming it to have been so far beneficial, should not at least be given to, and exercised by, local courts in Liverpool and elsewhere, and that as widely and effectually, in point of form, as it is now exercised in any other part of the empire.

As to proceedings *after* judgment; if the debtor has either goods, or debts owing to him within the kingdom, his absence, or the fact of his being a foreigner, does not now obstruct the course of justice. But if the property on which, alone, the judgment can take effect be within the territory of a foreign power, its operation is subject to foreign laws, the effect of which, as has been stated, is, in some instances, such as to prevent the recovery of the debt, and in others to place in the way of its recovery apparently only such obstructions as are necessarily implied in the independence of separate nations.

Here, then, are suggested *two descriptions of reform*—one of our internal polity, and the other of our national relation to foreign powers. One within the domain of *legislation*, the other within that of *diplomacy*. Both, however, are based upon the same principle: that of equal justice. What is right in London or in Bristol, at Leith or at Havre, cannot be wrong in Liverpool or in any other English town. And what our Government willingly does for foreigners, foreign governments may be fairly asked to do for us.

#### ART. IV.—IMPRISONMENT FOR DEBT.

**B**Y the Debtors' Act, 1869, 32 & 33 Vict., c. 62, which was passed last Session and will come into operation with the new year ; imprisonment for debt, taking that expression in its old sense of a *ca. sa.*, is abolished. But it cannot be too clearly remembered that imprisonment for debt up to 50*l.*, under the more modern name of commitment, still remains and is indeed extended. How important this may be to all classes, and how many serious questions it opens, we will presently briefly consider ; meanwhile, it is our object to describe what good has been accomplished by the new statute. It may, however, be as well to premise that in the course of these remarks we shall divide our subject into three divisions, for the sake of convenience, and so treat shortly ; 1st. Of imprisonment for debt generally ; 2nd. Of County Court committals ; and 3rd. Of the punishment of fraudulent debtors.

The history of imprisonment for debt, if it were told by a graphic description of its effects upon many portions of society, would be a dark story of narrow-minded oppression, beginning in very early times and coming down to our own day, varied, indeed, by a few occasional acts of mercy to poor debtors, but on the whole distinguished for that spirit of conservatism, and that disregard of a nation's progress, for which English law has long been famous. That its abolition should have been reserved for a strong liberal government in this time of enlightenment and just public opinion is not saying much for the governments and the public views concerning it that have gone before. Neither is it matter for sincere congratulation that the abolition which has at length come, should be but partial, and therefore incapable of amending in any way a real evil that now exists and must continually increase.

The origin of imprisonment for debt, is thus described in Bacon's Abridgment, vol. iii., p. 352, under the title "Execution"—

"By the Common Law only the annual profits of the land as they arose, and goods and chattels of the debtor, were liable to be taken in execution; for neither his body nor lands were affected by recognisances or judgment for debt or damages."

And he further says:—

"The reason why the Common Law subjected only the personal estate to the payment of debts seems to be that it was only a chattel that was lent, and therefore the chattels of the debtor were liable only to pay it; and formerly men trusted one another no further than they had personal chattels to answer the debt. But, gradually this changed, and accordingly we find that towards the reign of Edward I., when Magna Charta had given to tenants the power of alienation, which they might use if they left enough to answer the duties of their tenure, they began to subject the land to answer the debts in trade; and as they grew more and more a trading people, it was thought reasonable that the person should be liable, that a close confinement might oblige the debtor the sooner to satisfy his creditors, and also make him the more wary how he contracted debts without the prospect of a competent fund or provision to discharge them."

Thus it was that the statute 13 Edw. I., was passed, which according to the preamble was for the "security of merchants and the encouragement of trade." But it was not until the reign of Edw. III. that this matter seems to have been settled, for the Statute 25 Edw. III., c. 17, first gave the writ of *capias ad satisfaciendum* and extended the right of imprisoning a debtor upon judgment to all common persons. A curious case confirmatory of the above account is given by Sir E. Coke, (*Co. Litt.*, 280) where the defendant in the 14th year of Edw. III., was discharged from a *capias* because he was of so advanced an

*age quod pœnam imprisonmenti subire non potest.* Blackstone describes the *capias* as a writ to imprison the debtor until satisfaction be made for the debt or damages and costs. It is of the highest nature, inasmuch as it deprives a man of his liberty till he makes such satisfaction, and therefore, when taken in execution under it, no other process can be issued out against his lands or his goods, and it is considered as a satisfaction of the judgment as against him.

So we see that at the time of its beginning, imprisonment for debt was doubtless a wise and useful provision of our law, but owing to the total change that in the course of years, came over the relations of debtor and creditor it fell into an instrument of oppression and as such brought every kind of misery and abuse in its train. For though the theory might still remain fair enough and even the practice lead to no evil results when the numbers were small and trade and giving credit but little practised; this is surely no reason why it should be equally applicable to a different state of society when commerce and, therefore, debts were greatly increased. It could not but be at all times a somewhat barbarous remedy and in a more civilized community it was more than ever out of place. The English law is so careful of the liberty of the subject that it is perhaps curious to find a statute passed giving the creditor a right to imprison his debtor an indefinite time for a mere debt. But it must be remembered that from the earliest ages we have held the rights of property as something almost sacred, and this principle has been so strong as to overcome the opposite one, viz., regard for personal liberty. That some people have doubted this is, however, proved by a curious fact, that will be found referred to in the volume of Bacon's Abridgment (p. 384) above quoted from. It appears, that an intemperate pamphlet, entitled "*Liberty Vindicated against Slavery,*" was originally published in 1646, and republished in 1771. The aim of this being to show that imprisonment for debt

was illegal, for that the Act, 13 Edw. I., was contrary to Magna Charta, that statute having declared that anything enacted to the contrary of its provisions should be null and void, and as subsequent Acts giving the writ of *capias* were founded upon this one they must be void also. The pamphlet is certainly not much as an argument against the law, but it does at all events show that some thought the matter doubtful. The strictness with which the creditors' right was enforced and the vulgar notion of his absolute power over the body of the debtor, arising, probably from long experience, may be exemplified by a curious fact. At one time a popular but mistaken idea was entertained that the corpse of a person dying in prison under a *ca. sa.* might be detained until he made satisfaction. This may seem very absurd, but it was once so firmly believed in, that it had to be judicially settled in the case of *Reg. v. Fox*, 2 Q.B., 246.\*

It is not necessary for our present purpose to trace every statute that may have been passed upon this subject, since the time of Edw. III. It is however clear that the law continued to be almost as harsh and comprehensive as on its first inception, for we find that down to the reign of our present Queen, debtors could be imprisoned for any debt over forty shillings. That in later times the law must have become very oppressive and unjust is proved by the fact that it was necessary to pass the statute 48 Geo. III, c. 123, providing that debtors taken in execution for a less sum than twenty pounds, should, *after a year's imprisonment*, and upon application to the court, obtain an immediate discharge. This enactment needs no comment from us; it shows only too clearly what was the extent of the evil for which it gave so poor a remedy. Notwithstanding this, the old law continued down to very recent times and it was not until the statute 7 & 8 Vict., c. 96, s. 57, was passed that *ca. sa.*'s for sums under twenty pounds were finally abolished. From that time till now we have had various Acts for the purpose of

\* Stephen's Blackstone, vol. iii., 697.

mitigating the severity of the law, and preventing the hardship on poor debtors of a long imprisonment. Among these we may mention those for the relief of insolvents, and in particular the Bankruptcy Act, 1861, which made it impossible for prisoners to be kept in gaol for an indefinite time, and gave them an easy way of obtaining their release by petition *in forma pauperis*.

We have now briefly sketched the history of imprisonment for debt, from its origin down to its abolition by the 4th section of the Debtors' Act, 1869, which provides that, with the exceptions thereafter mentioned—

“No person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money.”

The exceptions are six in number, and comprise :—

“Default in payment of a penalty or sum in the nature of a penalty, other than a penalty in respect of any contract : or of any sum recoverable summarily before a justice or justices of the peace. Default by a trustee, or person acting in a fiduciary capacity, and ordered to pay by a Court of Equity any sum in his possession or under his control. Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same, in his character of an officer of the Court making the order. Default in payment, for the benefit of creditors, of any portion of a salary or other income, in respect of the payment of which any court having jurisdiction in bankruptcy is authorized to make an order. Default in payment of sums, in respect of the payment of which orders are in this Act authorized to be made.”

“Provided that no person shall be imprisoned in any of these cases for a longer period than one year and that nothing therein contained shall alter the effect of a judgment except as regards the arrest and imprisonment for default.”

These provisions speak for themselves, they are quite fair, and doubtless, necessary, but the most important

exception, for such it really is, is that contained in section 5, saving the power of committal for small debts; but to this we shall presently refer more at length. Section 7, provides for the discharge of all persons in custody at the commencement of the Act, who will then not be liable to imprisonment, without prejudice to the creditor's rights of enforcing payment in any other way and without depriving him of the benefit of any security on the debtor's property. Section 8, enacts that, "Sequestration against the property of a debtor may, after the commencement of this Act, be issued by any Court of Equity in the same manner as if such debtor had been actually arrested." There are other provisions, defining certain words &c., to which it is not necessary for our purpose to refer here.

Nothing could be shorter or more simple than this Act, which at length abolishes imprisonment for debt, and the wonder only is, how such a necessary measure can have been so long delayed. Yet there is a large class of people, even now-a-days, who would have the old system continued, and who cry out now, as their ancestors have cried out before, at every attempt to amend the law; that the result will be heavy losses to all creditors, and an universal inclination against giving credit. This notion is indeed one of considerable antiquity, but as it has been so often and so thoroughly proved to be false, this fact should hardly entitle it to respect or belief. Certainly, of latter days, the number of prisoners, and consequently the extent of the evil, has been much lessened, mainly by the establishment of Insolvent and Bankruptcy Courts; but this should not make us forget what the system really was when in full force. And in doing this it would be well if we took such a lesson from the past as to make us heedful lest it be repeated in the future. Alsatia, that infamous refuge of crime and wretchedness, was increased in numbers, and not improved by the presence of "gentlemen," who were wanted by the bailiffs. The story of the Marshalsea is familiar to most of us, though perhaps only through the

medium of a famous novel, and it has in it so many chapters of misery and oppression that it cannot easily be forgotten. In the Fleet, the old debtors' prison for Middlesex and the City, we have another example of an institution famed for its iniquity, and when the Queen's Bench was abolished in 1863, everyone was glad to see an end put to so many abuses. But all this was only the necessary result of keeping up an old law long after its utility and propriety had departed. Though a custom has once worked well, that is no argument why it should be maintained when such evils have become possible as its consequences. Sponging-houses were too, in the palmy days of imprisonment for debt, a standing institution, bringing profit to many sheriff's officers, but increasing to a very great extent the social harm that was done by executions against the person. They encouraged every species of extravagance and vice, but they also were one of the results of the old system. We have thus briefly referred to the past history of our debtors' prisons, to refresh the memory of those who are so much in favour of commitments, and we have no hesitation in saying, that if the present practice of County Court committals is continued and extended, all these same evil results of the old law will become both possible and probable under the new.

Our readers are doubtless aware that previous to the year 1838, arresting the debtor was the ordinary and legal method of commencing an action against him. This was found to lead to great hardship, and accordingly in the above year, and by statute 1 & 2, Vict., c. 110, arrest on mesne process was abolished. But by the 3rd section of that Act one exception was allowed, and it was provided that a creditor might obtain a writ of *capias* against his debtor, or rather the defendant in the action he must first have commenced, upon an affidavit stating that his debt was over 20*l.*, and that he had good cause for believing that the defendant intended to leave England. Upon this, the judge being satisfied that it was so, the debtor was arrested, and then he might either remain in



custody, or be released upon his giving bail to the sheriff, or depositing with him the amount of his debt, together with 10*l.* for costs. Such has been the law since then, but by the Debtors' Act, 1869, it is altered, section 6 of which enacts that—

“After the commencement of this Act, a person shall not be arrested upon mesne process in any action.

“Where the plaintiff in any action, in any of Her Majesty's superior courts of law at Westminster, in which, if brought before the commencement of this Act, the defendant would have been liable to arrest, proves at any time before the final judgment by evidence on oath, to the satisfaction of a judge of one of these courts, that the plaintiff has good cause of action against the defendant, to the amount of *fifty* pounds or upwards, and that there is probable cause for believing that the defendant is about to quit England unless he be apprehended, and *that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action*; such judge may, in the prescribed manner, order such defendant to be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given the prescribed security, not exceeding the amount claimed in the action, that he will not go out of England without the leave of the Court.”

The general purport of this section is as will be seen, the same as that which has hitherto been in force, and for convenience we have marked the alterations and additions by printing them in italics. As the plaintiff will no longer have a right to a *ca. sa.* it is only fair that he should prove something more than the defendant's intention of leaving England, before obtaining a *capias*. But it is impossible to say what will be necessary until we find how the words of the Act will be construed. How is the absence of a defendant likely to “materially prejudice a plaintiff” in the prosecution of his action? If the former should be a necessary witness in making out the latter's case, doubtless that will be enough, but we cannot imagine any other instance that will form sufficient

ground for a *capias*. Altogether it appears most probable that, owing to so great a restriction, this form of imprisonment will be little used, but, as already observed, it is very much a question of construction and we must wait to see how it will be settled.

We will now turn to the second division of our subject—County Court committals; which is one of daily increasing importance, and as such well worthy of some consideration.

The theory of County Court committals is comparatively a new one, originating, in fact, about the time of the County Courts themselves. When *ca. sa.*'s were abolished in all cases under 20*l.*, by the 7 & 8 Vict., c. 96, it was enacted by sec. 59 of that statute, that where the debt had been fraudulently contracted, or without reasonable assurance of being able to pay it, the judge might order such defendant to be taken in execution as if the Act had not been passed. So far as we know this special power has never been acted on, although still law until January 1st next. But in the following year by the 8 & 9 Vict., c. 127, powers of committal identical with those that were subsequently given to the County Courts were intrusted to the Bankruptcy Court, and the Courts of Requests; under which debtors were summoned to show cause, and then ordered to pay wholly or by instalments, and after disobedience to such order, committals issued. This provision was inserted almost verbatim in the original County Courts' Act, 9 & 10 Vict., c. 95, and has since remained substantially the same. It contains a principle wholly unknown and quite foreign to the Common Law. It has no relation to imprisonment on a *ca. sa.* or on mesne process. It is simply a punishment, not, theoretically at least, for owing the money, but either on the ground of fraud, or because the debtor having had means to do so has obstinately refused to pay his creditor's just claim. This latter is the most common reason for committals, and for this and this only will judges have power to grant warrants under the new Act. As it will not be substantially altered by the last statute, and as a clear

understanding of the subject is necessary to arrive at a fair decision, we will briefly explain the process now in use for obtaining a committal.

The plaintiff having succeeded in getting a judgment for his debt, probably with an order to pay by certain fixed instalments, can, upon the defendant's failure to comply with this order, apply for a judgment summons against him. In the form of application the creditor must state the ground upon which he intends to rely for obtaining a warrant of committal. Supposing him to state that the debtor has had the means of payment but has refused: this is the reason now generally given, and as already observed, it will be the only one available under the new Act: he has to sign a form to that effect which concludes with these words—

“And I undertake to prove to the satisfaction of the Judge at the hearing, that the judgment debtor has been able, since the judgment, to pay the amount ordered by the Court, as it became due.

“I am aware that if I do not prove the same accordingly, that I shall have to pay the cost of this summons.”

Upon this application a summons is granted, calling upon the defendant to attend the Court at a certain time, for the purpose of being examined touching his means and the circumstances under which he contracted the debt. The onus is then upon the plaintiff to prove his contention by showing that his debtor has had the means of paying the instalments as ordered since the date of the judgment. The judge being satisfied of this, a warrant is granted.

Now this looks so simple that it would appear difficult for any one to misunderstand it entirely. Yet mistakes are very often made. The favourite popular delusion is, that the imprisonment is intended to punish the debtor for his contempt of Court in not obeying the Judge's order. This confusion of thought is natural enough in a non-professional mind, but we were rather astonished to find the mistake most

clearly repeated in the columns of a legal newspaper that has always taken upon itself to defend the present system. We had expected that the advocates, at least, of County Court committals, would have known something about the principles upon which they are founded, and not be content with echoing a few popular prejudices that find favour with every creditor. The idea about contempt of Court, though exploded now, was once perfectly correct, for when the County Courts were first established, warrants of committal were granted simply for the contempt the debtor had shown in not having attended the Court as directed by his summons. This sweeping power was found almost too strong even for poor defendants of the lowest class, as the returns showed that in the one year 1859, nine thousand and three men had been sent to gaol. By the Statute 22 and 23 Vict., c. 57, entitled "An Act limiting the power of Imprisonment for Small Debts exercised by the County Court Judges," and containing but one clause: this section was repealed, and the question of contempt entirely done away with; but it very naturally clung to the popular mind, and is the standing delusion to this day. Though, strictly speaking, a most incorrect expression, and one that has no foundation whatever in theory, yet practically it often seems quite appropriate: for when the judge requires but scant proof of the defendant's means and tells him that the debt has been already found due by a judgment of the Court, a poor debtor who is unable to pay and therefore goes to prison, cannot but think that he is sent there for some mysterious crime of contempt that he has unwittingly committed.

The alterations effected by the new Act are contained in section 5. The material clauses of which are as follow—

"Subject to the provisions hereinafter mentioned and to the prescribed rules, *any court* may commit to prison for a period not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment, or of any

debt due from him in pursuance of any order or judgment of that or *any other* competent court.

“Provided (1.) That the jurisdiction by this section given of committing a person to prison shall, in the case of any court other than the superior courts of law and equity, be exercised only subject to the following restrictions:—that is to say

“(a). Be exercised only by a judge or his deputy, and by an order made in open court, and showing upon its face the ground on which it is issued.

“(b). Be exercised only as respects a judgment of a superior court of law or equity when such judgment does not exceed fifty pounds exclusive of costs.

“(c). Be exercised only as respects a judgment of a county court by a county court judge or his deputy.

“(2). That such jurisdiction shall only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default and has refused or neglected, or refuses or neglects, to pay the same.

“Proof of the means of the person making default may be given in such manner as the court thinks just ; and for the purposes of such proof the debtor and any witnesses may be summoned and examined on oath according to the prescribed rules.

“Any jurisdiction by this section given to the superior courts may be exercised by a judge *sitting in chambers, or otherwise*, in the prescribed manner.”

It is also provided that any court may order a debt to be paid by instalments and may vary or rescind such order. Persons committed by a Superior Court are to be sent to the same prison and otherwise treated as if under a *ca. sa.* Persons imprisoned under this section will be discharged by the prescribed certificate, and it is also provided that—

“No imprisonment under this section shall operate as a satisfaction or extinguishment of any debt, or demand, or cause of action, or deprive any person of any right to take out execution against

the lands, goods, or chattels of the person imprisoned, in the same manner as if such imprisonment had not taken place.”

The most important alteration made by the new law is in giving the same powers of committal to the Superior Courts as were formerly confined to the County Courts. It will of course greatly depend upon the construction put upon these clauses by the judges, how important will be their effect upon the classes they are intended for. The words we have quoted above, though they may seem very short and unsatisfactory, will with the rules that have to be made, compose the whole law upon this subject, all previous Acts being repealed. If the Superior Courts should decide to require strict legal proof of the debtor's means, we believe that this power will be but little used. Such decisions would necessarily be quoted in the County Courts, and thus have a considerable effect on the number of committals in those tribunals. But if, on the contrary, a practice should grow up by which judges at chambers would grant warrants on loose evidence, and somewhat as a matter of course, then we cannot but return to the worst times of imprisonment for debt under another name. So important is this question that, in order to judge it fairly, it may be as well for us to consider how the present system has worked in the County Courts, and what have been its most serious effects.

By the “Judicial Statistics for 1868,” lately published, we find that in the course of last year, nine thousand six hundred and twenty-five debtors were sent to prison by the County Courts; of this total number thirty-three being from the City of London Court. In the year 1867, eight thousand four hundred and twelve were imprisoned, so that we have here an increase of one thousand two hundred and thirteen. Indeed, the numbers have been growing steadily during the last ten years, and at the present rate we may confidently expect that the next return will reach the grand total of ten thousand. Nine thousand six hundred and twenty-five

is, as will be seen, over six hundred more than the whole number of those who were imprisoned in 1859, when the law gave power to commit for the contempt of a mere non-attendance, and when that great increase since the beginning so shocked even County Court admirers as to make them pass the Act limiting this power to which we have already referred.

We can thus see very clearly how much this process is used, and finding that nine thousand six hundred and twenty-five debtors were deprived of their liberty in one year, it is only natural to enquire how this is done. Can it be said that all these men were simply obstinate, that they had means to pay their debts, and that it was only for their refusal to do so when ordered by the Court that they were sent to prison? The usual ground now, and the only one next year on which a warrant will be granted is that the debtor has at the time or has had since the judgment, means to pay the sum or instalment as ordered by the Court. The onus is and will be, on the creditor to prove this to the satisfaction of the judge. But it is evident that this proposition simple as it seems, opens the way to many dangers and difficulties. One fact, however, must be particularly remembered, viz., that the question of the debtor's means at the time of the committal has generally nothing to do with it, for however unable he may be to pay the debt then, he will go to prison if the plaintiff can prove that at any time since the judgment he had the means of discharging the claim. But how is a creditor to prove this by anything like legal evidence? He will probably be unable to show that the defendant has received any particular sum of money, or has been better off than usual since the judgment. It then comes to a question as to his ordinary means, and this is frequently very delusive. For the judge is not bound to consider the debtor's other liabilities or to enquire as to what other debts he may have had to pay in the interval. There was a clause in the Bankruptcy Act, 1861

(24 & 25 Vict., c. 134, s. 105), that provided for this; but, perhaps from its being placed in a statute upon such a different subject, it appears to have been unknown to the County Court Judges, and at all events it was not acted upon by them as far as we know; and by the new Act it is repealed, with the whole of the past Bankruptcy Law. The strict proof required therefore often comes to nothing more than the fact that a defendant remains in his former employment, or is still in the same business as when he contracted the debt; and this is sufficient at most County Courts. The judges see that creditors have many difficulties to contend with in making out their case; they have too, though perhaps unconsciously, a natural leaning towards plaintiffs and customers, and they think that when a defendant has neglected to pay a small sum of a few pounds or even shillings, it can only have been from obstinacy. They find that in many cases the issuing a warrant brings in the money when everything else has failed, and they but too often are apt to consider a defendant's neglect to pay his just debt as pretty strong evidence of a wish to defraud. Their sympathy is thus on the side of the creditor, while from their position in life they know very little of the troubles and difficulties that many poor debtors have to deal with. This is the only way of explaining how it is that so many as nine thousand six hundred and twenty-five debtors were actually imprisoned in one year.

The theory of commitment by a County Court is simply a punishment upon the debtor for not having paid what the judge considers he might have paid. Taking it so, all the consequences are consistent. If a man is arrested upon a *ca. sa.*, his imprisonment will be a satisfaction of the debt, and he can afterwards be liable to no other process. But a committal, being a punishment, it is not of course a satisfaction, and so a debtor is liable to be sent to gaol over and over again. That there may be no mistake about this the clause of the new Act already quoted is conclusive. Again, in



ordinary cases of execution against the person, bankruptcy would act as a release, but in the County Courts this has never been the case. Debtors must pay the debt, or undergo what may well be called their sentence. Indeed, to be perfectly consistent, it would seem that even payment should have no effect, for if the punishment of obstinacy be just, why should it be interfered with by the man's paying the debt any more than when the law declares he is released from all his liabilities?

But is this imprisonment just even in theory? No kind of criminal process can be taken for any injury that only concerns the individual without reference to the community. These committals are somewhat of a criminal nature, giving punishment by a certain fixed sentence. And yet, how can it be said that, even supposing a creditor did lose by his debtor's obstinacy in refusing payment of a few pounds, that would be an injury affecting the public, and therefore one proper to be punished by imprisonment at the public cost. All over the country debtors under warrants of committal are confined in the same prison and live under the same roof, as men convicted of various crimes. Surely there is something degrading in a system which, besides depriving debtors of their liberty from inability to pay, puts them into gaol among common criminals. It is impossible to suppose that men go to prison out of pure obstinacy and when they are quite able to pay the debt. It is far more probable that they are penniless, and however able they may have been once to find the money, at the time of their committal, they go to gaol for the crime of poverty.

We are aware that many do not agree with these remarks, but surely a large proportion of those who are in favour of County Court committals know nothing of the misery they cause, or of the way in which they are granted. It has been said that they are used more to frighten than with a view to any real operation, but the fact that over nine thousand six hundred men went to gaol in

one year is a sufficient answer to so short-sighted an argument. The majority of County Court Judges are, it is said, in favour of the present plan, but they can hardly look at the thing impartially. Their whole contention, too, only amounts to this, that they are *necessary*, and here we have the old story once more repeated. It is further declared that the poor man will not be able to obtain goods on credit should the system of locking him up for periods of between ten and forty days be discontinued. This talk about credit is hardly worthy of notice, for it is only the usual cry that we have heard at every step in the slow progress of law amendment. It has been proved wholly untrue as regards other classes; why then should it affect the poor and the proportionate credit that is given to them?

Now that committals have been extended to the Superior Courts the difficulty is got over which formerly existed of having one law for the rich and another for the poor. How this will work it is impossible to say, at least until the rules are issued, and even then the words that have been quoted and which contain the whole law will need a few cases decided about them, before their true construction is settled. But at all events committals in the County Courts will continue and increase, and the subject is daily becoming so important that we would speak plainly. We therefore unhesitatingly declare that the power of commitment should be taken away, and that there should be a real and thorough abolition of imprisonment for debt. Though this may not come for a few years, yet it cannot be indefinitely postponed, and we venture to think that within the next ten years at least our views will be carried out.

The second part of the Debtors' Act, 1869, relates to the punishment of fraudulent debtors. Section 11 enacts—

“Any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement in pursuance of the Bankruptcy

Act, 1869, shall, in each of the cases following, be deemed guilty of a misdemeanour, and on conviction thereof shall be liable to be imprisoned for any time not exceeding two years, with or without hard labour."

Then follow sixteen different cases, framed with the view of making debtors act honestly in the proceedings of their bankruptcy or liquidation by arrangement. We must here observe, as likely to be of some importance, that the clauses relate only to the two matters above referred to, and that no mention whatever is made of that third course which by sec. 126 of the new Bankruptcy Act, debtors may pursue, and which is called, "Compositions with creditors." This was probably an oversight in passing through the Commons, as sec. 126 was not in the original Bill, and being inserted by the Lords no one thought of altering the Debtors' Act to correspond. It is impossible to suppose the omission was intended, as there can be no reason to make any difference between arrangement by liquidation and compositions with creditors in regard to the punishment of fraudulent debtors. It is, however, not easy to see how the mistake can be remedied, save by an amending Act, as there are no general words that could bear a favourable construction.

It will be seen that these sixteen provisions are, as nearly as possible, the same as those of the Bankruptcy Act, 1861, allowing of course for the changes in procedure. But there is one great difference in principle that cannot but have a very great effect upon the practice. Under the present law creditors have to prove that their debtors committed certain acts with "intent to defraud." This is the old fashioned notion of presuming a man to be innocent until he is proved guilty: but by the new Act this is entirely reversed, and certain acts of a debtor are made misdemeanours *primâ facie*, and until the accused has proved his own innocence. As for example, by clause 3 of sec. 221, of the Bankruptcy Act, 1861 (24 & 25 Vict., c. 134), it is enacted that if the debtor shall, "after adjudication or within sixty

days prior to adjudication *with intent to defraud* his creditors, remove, conceal, or embezzle any part of his property, to the value of ten pounds or upwards," he will be liable to certain punishment. By clause 4 of sec. 11 of the Debtors' Act, 1869, this provision is in effect repeated though four months is substituted for sixty days. But the great alteration is found in the concluding words, "*unless the jury is satisfied that he had no intent to defraud.*" Here we see the difference very clearly as by the new law the *onus* is upon the debtor to prove his innocence of any guilty intent, instead of upon the creditor to show by some kind of evidence, its existence. This change is probably due to the fact that the present law has been but little used to punish fraudulent bankrupts, and it was supposed that the alteration would render the process easier and more effectual. Though an infringement upon a very old established maxim of our law, it may prove a successful experiment: yet we doubt whether even this facility will get over a creditor's dislike to take any trouble about a prosecution that, end how it may, can bring him no pecuniary remuneration.

There is one more section to which we could call attention, though unable from want of space to consider the whole of them in detail; it is the 13th and provides that—

"Any person shall in each of the cases following be deemed guilty of a misdemeanour, and on conviction thereof shall be liable to be imprisoned for any time not exceeding one year with or without hard labour; that is to say,

(1.) "If in incurring any debt or liability he has obtained credit under false pretences or *by means of any other fraud.*

(2.) "If he has *with intent to defraud* his creditors or any of them, made or caused to be made any gift delivery or transfer of or any charge on his property.

(3.) If he has *with intent to defraud* his creditors concealed or removed any part of his property since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him."

These clauses are of general application and though perhaps a somewhat dangerous extension of the criminal law they are framed for the protection of creditors and the punishment of fraud, and as such we hope they may be successful. The last provision is doubtless inserted to give more chance of getting paid upon a *fi. fa.* By sec. 14, any creditor making a false claim with intent to defraud will be guilty of a misdemeanour. There are various other provisions equally useful and necessary to which it is not now our intention to refer. It is, however, clear from what has been said that the present Acts have done something towards abolishing imprisonment for debt. That they have not gone further and swept away County Court committals is we think to be regretted, more particularly as it has been thought advisable to go so far contrary as to extend their operation. It is but just and fair that if there is any criminality mixed with indebtedness, an apt punishment should be awarded. But to do this, poverty need not be treated as crime, nor even obstinacy as a misdemeanour, and we would have the degrading effects of imprisonment reserved as a punishment for fraudulent debtors.

---

#### ART. V.—SUGGESTIONS FOR THE IRISH LAND BILL.

**S**ECOND on the list of measures for the settlement of Irish difficulties is the land question. Whether it is more or less important than the Disestablishment Act of last Session is a matter of very little moment. They are both part of one great project, which would not be complete if either were omitted. By the Disestablishment Act ministers have shown themselves to be really in earnest in their endeavours to redress Irish grievances, and the knowledge of this fact ought to remove some of the difficulties from the not very smooth path which they will have to tread when Parliament opens next spring. The Irish people

ought at least to credit them with the desire and intention, not only of proposing but of passing an Act which will be a real settlement of the question. Did the same feeling of confidence exist between Irish landlords and their tenantry as exists as a general rule in England, we should probably have heard very little about the relations of landlord and tenant. Matters would have progressed as smoothly in Ireland as they do in England; not, indeed, as the result of the law as it stands in either country, but rather in spite of its imperfections. They never have done so, and never could have been expected to do so.

Though in both countries the rights of landlord and tenant are regulated by the law of contracts, they have not the same origin. In England, they gradually arose out of the reciprocal relations of protection and service, which was the basis of the feudal system. The history of the Cromwellian settlement, on the contrary, tells us very little of the protection afforded by the recipients of forfeited estates, or of the willing attornment of their tenants. Even relations, commencing without mutual good will, might have been improved by time; had not religious differences and barbarous penal laws made a better state of things impossible. This is the chief reason why two classes of people, who have been neighbours two hundred years, could never come to an amicable understanding in furtherance of their mutual interests, and may, perhaps, in some degree account for the unwillingness of one side to concede rights which are capable of being, and not unfrequently have been, exercised unjustly, and may be the cause why the other side put forward demands tending rather to the destruction than to the well-being of civil society. Besides the want of a good understanding between the owner and the tiller of the soil, which is the best and happiest foundation on which to adjust their respective rights, there are other very important differences between the Irish and English tenant farmer, affording very sufficient reasons why it may be proper for

the State to interfere in the one case and not in the other. Until the latter half of the last century, Ireland was almost entirely a grazing country. About that time, in consequence of the high price of grain and the bounties offered to encourage its cultivation, many were induced to substitute tillage for grass, and this they set about with more than usual recklessness and want of foresight. Not having either the capital or the knowledge necessary to carry out the change, they neglected to erect proper farm buildings, and were consequently unable to restore to the land those elements of fertility of which their crops had deprived it, and for the same reason, want of means, instead of paying their labourers in money, they located them on portions of the land, and in this manner brought about the state of things which resulted in the catastrophe of 1847.

It thus became customary for the tenant in Ireland, instead as in England of entering upon a farm furnished with house and necessary buildings, to erect these himself, which, we need not be told, would generally be done in a cheap and unsubstantial manner. The least consideration will show how detrimental such a custom must necessarily be to the real interest, both of landlords and tenants. To the tenant, because he was obliged to sink that capital, which if employed in what alone is the proper business of farming, he would have been able to turn over from time to time at a high rate of interest, and to the landlord, if he acted conscientiously, because he was parting with the control over his inheritance, which it was manifestly his interest to retain intact, and by lessening the profits of his tenant was depriving himself of the full amount of rent which his land would otherwise have yielded.

This custom is still general, though no longer the universal rule, thanks to the good sense of many Irish landlords, and to the assistance offered by Government in the way of loans for improvements. The sooner the custom is altogether abolished the better, for until the farmers' capital is released

from the bondage of bricks and mortar, agricultural improvements will be slow, and the relation of landlord and tenant will never be without complications—complications which do not tend to their mutual harmony. Were the farmer's capital employed only in the cultivation of his farm, his profits would be largely increased; he would employ more labour at a higher rate, more food would be produced, and a greater number of persons would be able to obtain an adequate share of it. There would soon arise such a demand for improved implements as to make it the interest of manufacturers to set up works in different parts of Ireland; this alone would be of infinite service in creating and employing an independent race of skilled workmen. Mr. Mechi tells us, as the result of his improvements, that although he uses steam power and machinery, the permanent manual labour of his farm has been doubled, and every day's experience shows us that by increasing the food of the people, you increase the demand for labour. Everyone knows that it is impossible to cultivate land with profit, either in England or Ireland, without considerable outlay. Not only must there be expenditure on what are properly landlord's improvements, which a tenant ought not to be asked or encouraged to make out of his own money, but the tenant also must invest a considerable sum per acre in the business of cultivation, if he expects to farm with profit. It has been calculated that about 4*l.* per acre is the average capital employed by the English farmer, and it has also been stated by experienced practical agriculturists that they obtain a larger percentage on from 10*l.* to 15*l.* per acre so employed, than they can get from any smaller sum.

If, then, it is necessary that capital should be largely invested both by landlord and tenant, it is only fitting that, as far as possible, to each should be secured his proper share in the fruits of such investment. Ireland has suffered immeasurably more than England from the inadequate application of capital to the cultivation of its fields, partly from the



poverty of its people, but much more from (what is in a great degree the cause of such poverty) the want of security felt by all parties, for which the bad state of the law is mainly responsible. The tenant dares not risk the expenditure which would ensure him the full value of his take, because he has no security for possession beyond the time being, and the landlord—if even he is able, which frequently he is not—fears to grant him the security of a lease or make any improvements, lest he should lose all control over his tenant, who might allow the improvements to fall to ruin and work out the land, even if he did not leave it peopled with a starving population. The highest rent that can be got is not, in England, and much less is it in Ireland, a true criterion of the annual value of land. A man of means will always be outbid by one who has nothing to lose: and one who takes a farm with the intention of exhausting it, is always ready to give a higher rent for a few years than one who intends to act fairly towards it. It is against public policy to permit land to be let at more than its fair value, because it causes a diminution in the produce of the country, in which the public has an interest, places honesty and intelligence at a disadvantage, and produces a moral defect of character, inasmuch as by obliging men to make engagements, which they are often unable to fulfil, it renders them insensible and indifferent to the propriety of fulfilling them.

The country, for its own interest, should possess a tribunal which, while it left the contracting parties unfettered as to particular arrangements, should be charged to see that whatever terms were proposed should be such as were in accordance with public policy—fair and reasonable—and for the mutual interests of landlord and tenant, and those who claim under or after them to enter into. Without such sanction the law should give no special facilities for enforcing them, but when sanctioned, the same tribunal should also be charged to see that they were justly and equitably carried out, not by the clumsy, expensive, and inefficient process of law as it now stands, but

by a much more simple, inexpensive, and summary procedure of its own. The covenants contained in agricultural leases are generally little or no protection to landlords, but are often very burdensome to tenants. It is quite possible for a bad tenant to exhaust his land without violating any of the covenants contained in the best drawn lease. Restrictions in the use of the land's productions, enforcement of particular modes of management, without regard to accidents or the difference of seasons, and such like interferences with the judgment of the cultivator, often stand much in the way of profits, and sometimes of substantial improvements. It is not against the well-to-do, prosperous farmer that the landlord need protect himself, but against the needy and negligent one, who is constantly in pecuniary difficulties. Against the latter the security of a covenant is generally useless. Usually the mischief is done before the right accrues to sue for damages or proceed with an ejectment, and the result of a decree commonly is that neither damages nor costs are forthcoming. The hardest landlord will seldom think it his interest to incur the odium of having turned a pauper on the rates for such a chance of obtaining compensation. What is wanted is a tribunal not only capable of giving redress for an injury already committed, but able also to prohibit its commission. If the country exacts for the encouragement of, and in justice to, the honest and improving tenant that he shall be secure in his tenure until he has had time to remunerate himself for the capital, labour, and intelligence which he has bestowed on his holding, it is only right on the other hand that the landlord, who is obliged to accord that security should be protected against the damages which an incompetent or dishonest tenant has it in his power to inflict upon him, and it is politic also that responsible men should be protected against the competition of those who enter into engagements which they cannot fulfil. Every tenant should be compelled so to cultivate his land as that it shall not be deteriorated, or its letting value diminished, and the best way

to do this will be to enable the law not only to remedy injuries already committed but, also to stay injurious acts. It is a far more merciful course, as well as a more complete remedy, to prevent a man involving himself than to look on and, as it were, lie in wait till he has done so, and then proceed to ruin him.

This, it cannot be doubted, would not be beyond accomplishment by a simple and inexpensive procedure. In the North-West provinces of India it is not deemed foreign to the proper office, or beyond the power of the Legislature, to regulate the relations of landlord and tenant in such a way as to protect the rights and interests of both, and at the same time prevent the deterioration of land by bad cultivation. Yet customs relating to land in India are very numerous and complicated; there is great difficulty in becoming acquainted with them, and evidence is not more trustworthy in India than in Ireland. Indian officials have great experience in dealing with interests in land in the Collectors' Courts, and are as able to form an opinion of what is, and what is not, practicable as most men who have not had experience of the duties and working of such courts.

The creation of peasant proprietors throughout Ireland, has not been without distinguished advocates. Such a violent change in the constitution of property would be in itself, an evil, even if the end in view were certainly useful and attainable, but it is at least doubtful, whether such a change would be either beneficial or attainable. The true remedy for the present state of things, must be more simple and less revolutionary, or we shall fail to find a remedy at all. Mr. Mill says—

“Those who believe that small peasant properties are either detrimental to agriculture, or conduce to over-population are discreditably behind the state of knowledge on the subject;” and adds, “There is no condition of landed property, which excites such intense exertions for its improvement, as that in which all that can be added to the produce, belongs to him who produces it.”

We will not stop here to inquire whether the thousands of poor Irish peasants who have passed away, or emigrated because they did not obtain a bare subsistence from the patches of land which they held, were idle because they were tenants and not proprietors, or whether it was not because they could not find profitable employment; nor will we argue the question, whether hunger and the fear of death by starvation will not excite exertions as intense as ownership of land. This new philosophical libel on the Irish character is fully disproved by the industry invariably shown by the Irish race, whenever they have the opportunity of obtaining a livelihood by their exertions. Mr. Mill cannot place a higher value on industry than we do, or be more ready to admire the persevering exertions and success of peasant proprietors in many parts of the world, but when he exchanges the character of political economist for that of advocate he takes no account of such things as soil, climate, locality, &c., but appears to think that labour would be sufficient of itself and under all circumstances to produce the like result in any other part of the world. To show whether a system successful in one country is applicable to another, it is requisite to exhibit in detail the conditions and means under and by which that success has been accomplished and whoever has not fully informed himself on these particulars is deficient in the practical knowledge necessary to discuss the question. In all cases it depends entirely upon circumstances whether small pieces of land tilled by peasant owners or larger farms in the hands of those who are hirers only of the land, produce the better results.

This is a practical question and cannot be determined by theory. Those who wish to try the experiment in Ireland have lost sight of one most important point, one which of itself would be sufficient to neutralise the good effects of the most persevering industry, which however well directed is not of itself sufficient to guarantee permanently good crops.

No doubt well directed toil will draw from a virgin soil, or one in a high state of cultivation, an abundant harvest, but the land cannot continue to respond to the labour of the husbandman, unless there is restored to it, by means of manure, those animal and vegetable substances which growing plants necessarily take from it for their own nourishment. Without this, it frequently happens that the more the soil is tilled the sooner it is exhausted. This process of restoration is sometimes carried on by the application of substances brought from a distance, but more usually by the consumption by domestic animals of some part of the produce of the farm. In some populous districts, such as in a part of Belgium, where the large towns create a demand for vegetables and crops, which require and repay minute and constant attention, and where abundance of manure is procurable, spade cultivation is exceedingly successful, and the powers of the soil are fully developed; but where there does not exist a sufficient demand for those provisions which the market garden and the cottage farm are best able to produce, and when the supply of manure falls short of the requirements of the soil, spade husbandry becomes unprofitable. This is at present, and must long continue to be, the case in most parts of Ireland, and were the land divided amongst peasant proprietors, cultivating by the spade, without the means of procuring manure from towns, and without horses and cattle to manufacture it at home, the gradual but inevitable result would be, that the land would become exhausted, the food of the people would decrease as their numbers increased, and starvation and disease would again have their way. To those who advocate the creation of peasant proprietors for Ireland, and particularly to those who predict from the minute division of its land, the rise of France and the decadence of England, we would recommend the perusal of a series of articles which, about the end of 1855, or beginning of 1856, appeared in the French journal *L'Univers*, showing how the too great subdivision of the land in France

is gradually diminishing its productive powers. Some would place reliance on this publication, who would reject, as prejudiced or untrustworthy, English authorities, or even French government statistics.

Let it not be supposed that we are advocating the extensive use of expensive machinery, or that we believe that the division of land amongst a small number of great capitalists, would be either practicable or desirable. All that it is wished to insist upon is that the farmer should have the command of capital in proportion to the number of acres he holds, sufficient to enable him to make use of improved implements, take advantage of the markets, and make the best of his land. To do this his holding must be large enough to afford full employment to himself, his family, and in most cases to at least one pair of horses, so that he should never be taxed to maintain, in idleness, either man or beast capable of work. The size of farms should be regulated by the locality and the nature of the land. Large capitalists are here and there undoubtedly advantageous; they have it in their power to try systems and test inventions which the small farmer would be unable to do, but the farm where the farmer himself personally overlooks the labour of the fields, and his wife superintends the house and dairy, and has a personal acquaintance with every cock and hen on the establishment, has opportunities of profit, commensurate with those of large capitalists, in the many small sources of gain which they are able to attend to, and their being able to dispense with expensive, oftentimes negligent, and sometimes dishonest, supervision. No class is more respectable than this. A farmer of this kind, possessed of 1500*l.* or 2000*l.*, cultivating perhaps one or two hundred acres or less, does more for the land, and makes larger profit for himself than the small owner who, with the like amount of capital to work with, has 4000*l.* or 5000*l.* over and above invested in the freehold. Men of the latter class are seldom very successful farmers, either

in England or Ireland, and sometimes degenerate into a sort of sporting squireen, a class not particularly beneficial to society.

Except in the case of small tenants on very poor land, which is hardly worth any rent, it has not been made to appear that of late years land in Ireland has been generally let beyond its value, that is for more than an intelligent and industrious man having the requisite capital and holding acres sufficient to give him full employment could well pay, after retaining for his own use, as large a percentage on his capital as suffices to maintain an English or Scotch farmer and his family in comfort, but we are quite certain that a man whose holding is so small that a large portion of his time is unprofitably spent, or who is without the stock to supply him with manure or the means and opportunity of getting it must, in the long run, come to ruin, and *that* whether he has rent to pay or lives rent free. Any legislation which has a tendency to encourage or perpetuate holdings of this description will certainly be a mistake, and eventually hurtful to both tenant and proprietor as well as to the public. We would not, however, advocate any unbending rule which would say that a holding shall contain a fixed number of acres, at least without regard to the nature of land, the wants of the intending tenant and other attendant circumstances, or which would prevent the creation of small tenancies where they might be expedient. We are quite aware that in many cases the land could not be better employed. Independently of innkeepers and many persons who reside in or supply the wants of towns there are whole districts in some counties inhabited by persons who have ample means of doing justice to land and to whom the possession of an acre or two is a great boon. Fishermen have almost always plenty of manure within their reach, and can profitably employ the many hours when they cannot be following their vocation in the cultivation of land, and by this means they are able to protect themselves against the vicissitudes of a life which is notoriously precarious.

Positive and inflexible rules, whether they be in the form of statutes or covenants, are as much the bane of improvement and scientific culture as discretion and knowledge are its basis, and a statute as long as the statutes at large from Magna Charta to the present day would not suffice to contain positive laws suitable to the never-ending variety of circumstances which would constantly occur.

The reasons are not obvious which have brought into favour the idea of applying to Ireland the system of permanent settlement introduced into Bengal by Lord Cornwallis. In the first place the zemindars were originally merely hereditary collectors of revenue, allowed a percentage on the amount. They never were owners, neither were they cultivators of the soil, but with the hope of inducing them to lay out money in the improvement of the country, the Government pledged itself never to require from them more than the tax they then paid, and thus made over to them all future increase in the value of the land. Most people at the present day think that this was rather a random and improvident arrangement on the part of the Government, and that it has not proved beneficial to the ryot. Occasionally, through religious motives, a zemindar digs a tank or makes some public improvement, but the encouragement he gives to the ryot is almost universally limited to lending him money at the bazaar rate of  $37\frac{1}{2}$  per cent. Though the circumstances of zemindars in India and landlords in Ireland are so different that it is difficult to compare them, we are not by any means sure that very practical hints may not be obtainable from the the pages of Marshman and Boutros, as to modes of assessment and such like details, which might prove useful to those who have in preparation the Bill to be brought forward next year.

It is hardly necessary to say anything about fixity of tenure as the *Times* newspaper has recently and convincingly demonstrated the evils which would follow therefrom, were it ever established. The state of Ireland imperatively requires

•



that a radically bad system of tenure should be replaced by a better, that custom and law should not be at variance, and that the latter should enforce that which is morally just, and refuse to enforce that which is not so ; but the state of Ireland does not require the banishment of the present owners of the soil by reducing them to the condition of mere annuitants, nor does it require that because some amongst them may be harsh and tyrannical they should be replaced by a class notoriously more exacting and less mindful of proprietary duties, nor does it require that the place of those who have every opportunity of mental culture and of extending knowledge and civilization should be occupied by men whose means of culture are extremely limited, whose education is almost always defective, and whose intellectual attainments are not unfrequently below those of mechanics. Fixity of tenure may be an excellent watchword for agitators and editors of Fenian newspapers but their interests are one thing, the wants and well-being of industrious tenants another thing.

To benefit Ireland, which at present has few other resources, agriculture must be made to flourish, and this it cannot do where the farm is undrained or the farmer has not, or dares not, employ capital in its cultivation. To further this object, the Landed Property Improvement Act of 1860, and subsequent Acts should be supplemented to the extent at least proposed by Lord Mayo in the Bill, intituled "Tenants' Improvements," which he, in conjunction with the then Solicitor-General for Ireland, introduced in 1867. This Bill, it will be remembered, proposed to enable tenants (subject to the sanction of a Commissioner, whom it required to satisfy himself that the increased value of the holding would be greater than the amount of the charge which would be created) to effect certain specified improvements which are divided into six classes, viz.—

1. The thorough drainage or main drainage of land.
2. The reclaiming of bog land, or reclaiming or inclosing of waste land, or clearing land of rocks or stones.

3. The removal of useless fences.
4. The making of fences.
5. The making of farm roads.
6. The erecting of a farmhouse or other buildings solely for agricultural purposes suitable to the holding, or the rebuilding or enlarging the same.

The last three numbers (4, 5, and 6) were to be dependent on the consent of the owner, but the tenant was to be allowed to carry out the three first without such consent, and was to be enabled to do so with money borrowed from the State. The policy of this measure is unobjectionable—advantageous alike to landlord and tenant, without being burdensome to the State. The regulations necessary for the security of the State as lender would also be advantageous to the borrower, by securing him against any unprofitable outlay and guaranteeing him the best possible advice in carrying out valuable improvements. Such a policy is not in any way hostile to the rights of property. Men who do not admit the right to restrict the liberty of the individual for his own benefit are yet constrained to admit that society possesses that right, which it is morally bound to exercise, when the unrestrained liberty of one individual trespasses on the rights and happiness of others. It is surely then a legitimate exercise of right when the State places certain restrictions, not on personal liberty, but only on the exercise of certain rights of property, when the doing so has for its object the true interests of the owner himself, the protection of rights as sacred as his own, and the well-being of society. We cannot see how any of those acts which the tenant can undertake without the landlord's consent could be used to his detriment, except perhaps in some very exceptional cases (the third), and we think that the consent of any judge or commissioner would be withheld on very slight grounds if it were the wish of an owner to preserve any particular fence, though useless in an agricultural point of view. A second Bill, introduced also by Lord Mayo at the

same time, proposed to give limited owners the right to grant agricultural leases which should not exceed thirty-one years ; improvement leases which should not exceed forty-one years ; and building leases which should not exceed ninety-nine years.

We entirely agree with the policy which would enable limited owners to grant leases. We think that every encouragement should be given to induce absolute as well as limited owners to encourage the proper cultivation of their estates, by giving the tenant such security of possession as will encourage him to do so, but we think that in general a twenty-one years' occupancy is sufficient for this purpose, where the tenant is able by the assistance of the State to make all the more expensive improvements which may be necessary without expending his own capital, but where a man has reclaimed land he should be protected against being turned out in his old age, by making the term of his lease his own life, or forty-one years. The limited owner ought not to be emancipated from the restrictions which those from whom he received his property thought necessary for the protection of those who were to enjoy it after him, without taking care to guard the interests of the latter by making it subject to the sanction of the Landed Estates' Court. The Bill of Lord Mayo proposed to protect the interests of successors, by providing that the lease should imply covenants for the proper management of the land, against assigning or subletting without consent, for reserving the best yearly rent without taking anything in the nature of a fine or premium ; but there is no provision made in agricultural leases to determine whether the rent reserved is or is not the best that can reasonably be obtained. We know that there are many political and other services and favours which could not be said to amount to anything in the nature of a fine or premium, but which might serve as inducements to reserve an inadequate rent, and it does not always happen that the present and future owners are on such terms as to make the former very careful guardians of the interests of the latter.

This Bill of Lord Mayo is open to a greater objection, which is, that these provisions and covenants can only be enforced by litigation in the ordinary courts. There are some cases, no doubt, when it may be worth while to sue for a breach of covenant, but any one who has had experience of how expensive and inadequate are the remedies afforded by proceedings before the ordinary tribunals, will be very unwilling to have recourse to them. Many questions which now necessitate the employment of attorneys, who have to summon hosts of excited witnesses, whose factions and contradictory evidence requires all the care and acuteness of an experienced judge, could be settled at not a tithe of the cost, and with far greater certainty, by the simple proceeding of sending an impartial and experienced man to visit the holding. One cannot wonder at the excitement and ill-feeling generated, when we remember that such a proceeding is frequently the ruin of the tenant, and always tends to demoralize the country. The policy of straining the conscience of the peasant when not absolutely necessary, by requiring him to pronounce a sentence of ruin on one of his own class, when he knows his own turn may come next, is exceedingly doubtful. All that a landlord has a right to ask is, that his estate shall be secured against deterioration; and this could be easily accomplished by a court having the requisite machinery to enable it to inquire into the nature of any Acts or intended Acts complained of, with power to remedy or prevent such as it shall determine to be injurious. A tribunal, not dependent on the testimony of partial and incompetent witnesses, but able to arrive at facts and judge of their consequences by means of its own responsible officers, whose skill and impartiality would be open to the judgment of every one, would have the best means of determining justly, and would obtain public confidence, and at the same time would also do much to check the excessive litigation and consequent ill-feeling and loss of time which prevails in Ireland. Englishmen should also remember that the Irish people have

no great liking for the law by which they have hitherto been governed, and are more apt to consider the ordinary courts of law instruments of oppression than fountains of justice.

Of all courts at present in existence, the Landed Estates' Court appears most capable of being fitted to deal with the land question. It has already obtained great experience in matters connected with land, and is not a local tribunal, swayed, or supposed to be swayed, by local interests, or biased by local ideas, in all which particulars it is much to be preferred to the Court of Quarter Sessions. If, for convenience, its judges were enabled from time to time to visit the provinces in the manner of Common Law judges, it would be far better than bestowing jurisdiction upon a number of local courts. In the first place, its judgments would be much more open to the general public opinion, which would assist it by the discussion of its acts, and would be at the same time a guarantee of its perfect independence; and as its decrees would be made public at the same time as the facts and reasons on which they would be founded, it would obtain support and protection against the false or coloured statements of interested or aggrieved persons. It must be remembered that party feeling, in all that regards land, runs very high in Ireland, that the judges of such a court would necessarily have much left to their discretion, that they would have to adjudicate between parties whose interests as a class are supposed to be at variance, and that it would be extremely difficult, if not impossible, to persuade that class to whom the judge is supposed, by birth, religion, or education not to belong, that this discretion had been fairly exercised. The decisions of such a tribunal would be much more uniform. Nothing would be known beforehand as to the person who would be employed in any particular district, and there could not be any speculation on the real or supposed tendencies of either the judge or any of the ministerial or subordinate officers attached to the court. In fine, its decrees would be those of a court having the confidence of the nation,

instead of those of a court which at most could only have, but probably would not have, the entire confidence of the locality where it was placed.

To sum up briefly, the first requisite for the improvement of agriculture and the employment of the people is to encourage the application of capital to farming operations. One portion of this capital ought to be furnished by the landlord, the other must necessarily belong to the tenant. It would enable and induce the landlord to do his part if the State were to give him facilities, by loan, payable in a given number of years, to the extent proposed by Lord Mayo. To bring the tenant's capital to bear we suggest: First, That he should be encouraged to employ it on the cultivation of the soil which, if done judiciously, would yield him a good percentage, rather than sink it in landlord's improvements, and that he should also be protected against the necessity of parting with any considerable portion of it to obtain possession. Secondly, That he should be secured against excessive rent, to which he is rendered liable by the competition of those who have not anything to lose. The measure of rent should be what the land in good heart and well cultivated is fairly worth, and not what it may happen to be worth when the tenant enters upon it. If in a bad state, the tenant should be allowed a deduction of rent for a certain number of years, to compensate him for extra expense and deficiency of yield, but he should not be excused the duty of bringing it into a profitable state, because it was not so when he took possession, for good policy requires that all land should be well cultivated. And Thirdly, That he should be guaranteed the fruits of his expenditure and enterprise against all but his own defaults by undisturbed possession, as a general rule, for twenty-one years. To prevent tenants being obliged to sink capital in landlord's improvements they should be enabled to effect, by means of loans from the State, such works as from their nature must necessarily improve the land without the landlord's consent.

To secure the farmer against the possibility of excessive rent, the assent of the Landed Estates' Court should be essential to every contract for the hiring of land which is to be employed in agriculture, whether the property be in the enjoyment of an absolute or limited owner. Without this assent the proprietor should not have any greater rights than he would have against an ordinary debtor. A landlord should be quite unfettered in the choice of his tenants, who should always owe their selection to his good will, but it is much better that neither he nor his agent should fix the amount of rent. In England, this is sometimes done by appointing a professed valuator, but in some large and well-farmed estates the custom is to determine the amount of rent by the arbitration of two persons, one being appointed by the agent, the other by the chosen tenant, or by an umpire whom the two arbitrators have previously selected. Ireland is scarcely in a condition to adopt the latter system, and by far the least expensive, most competent, and most responsible valuator would be one appointed by and acting on behalf of the court. To make it the interests of landlords to let their land under the sanction of the Landed Estates' Court, they should be secured against assignment without their consent to a bad tenant, against subletting, and should be provided through the tribunal with a cheap and effectual means of preventing waste or bad cultivation. As a general rule the mere agricultural tenant should be secured the possession of his land for twenty-one years, but as there are cases where it would not be reasonable to require an owner to part with the possession, or inconvenient for the tenant to hold the land for twenty-one years, the court ought to have full power to substitute any shorter term whenever both parties desire it, or whenever sufficient reason is given why a shorter period only should be granted. To secure the tenant against any unjust or inequitable use of landlords' powers, and the landlord against the consequences which he has sometimes reason to fear when he insists upon rights

which are neither unjust nor inequitable, we would abolish the right of the latter to destrain or seek redress by his own act, but would transfer all remedies to the Court, which should possess all the powers of a Court of Law and Equity to use at its discretion, without bringing landlord and tenant into collision. It should be sufficient for either owner or occupier, who considers himself aggrieved, to fill up a form stating the nature of his complaint, either suggesting or not the mode of redress which he considers applicable, and praying such remedies as the court shall think it expedient to order, whereupon the court should both inquire into the truth of the complaint and apply the remedy by means of its own officers.

If only for the peace of the country, we hope that the attempt which is to be made next spring, to settle the Irish land question, will be successful. The prosperity of the country will even increase its discontent, for the more men have to lose, the less willing are they to see what they have in jeopardy; and the longer a settlement is postponed the more difficult it will be to pass any Bill which will satisfy one party without doing injustice to the other. A measure, however, which is not dictated by reason, which has any object in view other than the well-being of *all*, or which attempts to satisfy any portion of society at the expense of another, will be unjust in itself, and will certainly fail in effecting a real settlement of the question. It appears to us that Mr. Gladstone and his colleagues have undertaken two things: the first and more difficult one—at least as regards some of the Queen's Irish subjects—being to give such a tone to the public conscience as to make it desire only that which is just and reasonable; and the second is to bring forward a measure not only just and reasonable in itself, but which shall for ever put an end to the discussion of Irish grievances in connection with the land, by making it patent to the whole world that they cannot any longer exist.



## ART. VI.—ON THE TURNPIKE SYSTEM.

WE propose to glance first at the ancient legal provisions for road repairs, and then at the more modern view of what is the Common Law on the subject, and next at the statutory provisions for highway reparation and management.

Of entertaining matter there is little in such a subject. Dr. Woodeson in his "Lectures on the Laws of England," dispenses with all notice of the system of Turnpike Acts, on account of its total want of interest. However that may be as regards the general inquirer, it was a mere excuse in an author writing for the instruction of students. Its usefulness would have conferred interest on the compilation, and interest it still has, for how to deal with the turnpike system is a question of the day.

If our inquiry were into the progress of road-making in this country, we might properly commence with a brief allusion to the state of things in the period of the Roman occupation, but of their plan of road management in this country we know nothing. Dalton, an old writer on parish law (c. 50,) considers that the Roman "Curator Viarum" exactly answered to our surveyor of highways. But Blackstone infers that the Roman office was of rather more dignity and authority than ours, not only from comparing the method of making and amending the Roman ways with those of country parishes, but also because one Thermus, who was the curator of the Flaminian Way, was candidate for the consulship with Julius Cæsar.

Of road concerns in mediæval times but little information is to be got from the ordinary trustworthy sources of information—the Statute Book and text writers. The *Via Regia*, the king's highway, open to all men, must to some extent, in some way or other, have been repaired, but how and whereby is still the question. The enactment of the Statute

of Winchester, 13 Edward I., that neither dyke, tree, or bush should remain within 200 feet of a highway, would serve for ventilation to a road, and for deviation from it. But it was as a preventive against robbery that trees were not to remain, "whereby a man might lurk to do hurt to passengers."

The repair of bridges comes under the same consideration as road repairs, and it seems first to have called for legislative interference. We find this provision in *Magna Charta*—"That no vill or freeman shall be distrained to make bridges or river banks, except those who were of right accustomed to do so in the time of King Henry II." The context, and the use of the word in the Statute of Bridges, show that "make" here means "maintain" or repair. The public interests, however, demanded service in this kind, and not exemption from it. Hence the Statute 22 Henry VIII., c. 5, for the repair of bridges, after reciting in section 2, that in many parts of this realm it cannot be known and proved what hundred, riding, wapentake, city, borough, town or parish, nor what person certain or body politic, ought of right to make bridges decayed on highways, enacts that the inhabitants of the county shall make (*i.e.* repair) bridges on highways, and make 300 yards of a road from either end of the bridge (for from the straitness of the bridge—deviation, the Common Law recourse from bad roads, was not practicable). But no like general provision was made for highway repairs. For that purpose, as in other cases, the Legislature, favouring particular places, passed local or special laws. Of this, we take a local example—by Statute 1 Mary, ses. 3, c. 6, the inhabitants of the cities of Gloucester and Bristol, and of the hundreds between Bristol and Gloucester, are charged with the reparation of the way between Bristol and Gloucester. At length the general law was invoked to supply this defect. The views of jurisperts, however, varied as to whose or what was the liability for highway repair. Sir E. Coke says (12 Co. Rep. 33):—

"That the Statute of Bridges was an affirmance of the Common Law, and that of common right all the country (county) shall be charged to the reparation of a bridge. So it is," he adds, "of a highway, of common right all the country ought to repair it, because that the country have their ease and passage by it, which stands with the reason of the case of the bridge."

Blackstone felt that the bridge was a strong parallel case. The way in which he dealt with it is characteristic. He affirms that the parish was liable at Common Law to repair highways and bridges, and that the Statute of Henry VIII., instead of being an affirmance of the Common Law, was an innovation. These are his words—

"Every parish is bound of common right to keep the highroads that go through it in good and sufficient repair, unless by reason of the tenure of lands, or otherwise, this care is consigned to some particular private person. From this burden no man was exempt by our ancient laws, whatever other immunities he might enjoy, this being part of the *trinoda necessitas* to which every man's estate was subject, viz., *expeditio contra hostem, arcium constructio et pontium reparatio*. For though the reparation of bridges only is expressed, yet that of roads also must be understood, as in the Roman law, "*ad instructiones reparationesque itinerum et pontium nullum genus hominum nulliusque dignitatis ac venerationis meritis cessare oportet*." And indeed now, for the most part, the care of the roads only seems to be left to parishes; that of bridges being in great measure devolved upon the county at large, by Statute 22 Henry VIII., c. 5. 1 Black. 35.

The theory of Common Law liability had been advanced before Blackstone's time. It got to be affirmed about the time of the Commonwealth, that the inhabitants of a parish in which a public highway runs are bound by the Common Law, or of common right, to repair it, and that such obligation could be enforced by indictment against them. Soon after the Restoration, Hale, Chief Justice, says, if there be no special matter to fix it upon others, the parish where the highway

is ought to repair it of common right. (*Sed quære*, says the reporter *Ventris*) "Why not the county, as in the case of common bridges?"

The liability of the county to repair bridges was put under limits by an Act of 1802. Thereafter the bridge to be chargeable to the county must have been approved by the county surveyor. But no provision was made for the repair of bridges not so certified, although used by and useful to the public.

Whether at Common Law the liability to repair the road involved the reparation of the bridge which carries it over waters may remain a speculative question, the present General Highway Act having thrown on the parish the public bridge not reparable by the county, under the definition of the word "highway."

The result is, that the safeguards of the Act limiting the county's liability are useless. The mischief mentioned in the Act, of the public being charged with maintaining bridges defectively built by private persons, still exists. In a question between public and private liability, it is immaterial whether the public, on whom the saddle is fastened, is called the county or the parish.

The statutory system of parochial highway management and repair began in the reign of Philip and Mary. The first General Act directed that the parishioners, at the bidding of the churchwardens and constables, should meet at Easter, and choose two honest persons of the parish to be surveyors and orderers, for one year, of the works for amendment of the highways in their parish leading to any market town. The surveyors had to appoint just after Easter, by notice in the Church, four days (afterwards six) of eight working hours each, for mending the ways. Every occupier of a ploughland, and every keeper of a draught or plough (and by a later Act, of a packhorse) had to provide one wain or cart, with horses or oxen, and two able men to labour, with tools. Every other householder, and every cottager, and every inhabitant

of middle age (except apprentices and menial servants), and (by a subsequent Statute) every subsidy man of 5*l.*, in goods, or 40*s.* in lands, not being a cottager, was to find one labourer with tools for this service. The personal labour of poor inhabitants on the highways was abolished by 34 George III. By such repeal, the universality of the obligation to highway repair ceased, and the burden was thrown on the occupiers of land and houses. The want of circulating medium in the provinces made Statute labour a necessity for a long period of time. But there was in 1773 introduced an easy scale of composition. Three men in lieu of a team, 4*s.* 6*d.* per day for a team; 2*s.* for a cart; labourers 4*d.* per day. It was not before the Act of 1835 that Statute duty, and compositions in lieu of it, were abolished.

In the Commonwealth (1656) limited money-rates were allowed—one shilling in the pound—and if the yield in one parish was insufficient for the works, the adjacent parishes could be rated in aid by the justices at sessions, but not exceeding a like limit. By the Act of 1773, this scale, if the duty and composition were insufficient, the surveyor might make an assessment of not more than sixpence in the pound per annum, and a special sessions might order an assessment on occupiers of lands of ninepence in the pound; and by 54 George III., c. 109, of one shilling, and ninepence, in the pound.

By the present Highway Act of 1835, a single rate is limited to tenpence, and there must not be more than three such rates in a year, unless with the consent of the inhabitants given at a meeting. But there may be additional rates for purchase of land, limited (to one-third of the rate) and for law expenses, which last is unlimited.

The Legislature, it will be seen, was cautiously charging parishes with limited duties and charges in regard to highway repair, while the Common Law threw upon them liability and charges of that kind without limit, and without regard to their capacity or ability to meet them. It was no answer

to an indictment for not keeping a road in repair, to say that the inhabitants had performed the task of work set by the Legislature. They were told that the Statutes were made in the affirmative, and did not abrogate any provision of this kind in the Common Law. Hence it follows that the course of legislation ran athwart the new-made Common Law, and conflicted therewith in a manner somewhat absurd.

This retrospect of the provisions of the Common and Statute Law on highway reparation is not of merely historical interest. It is important in considering the question of future repair of turnpike roads.

The increasing demand on the part of towns for improved highways between them and from them to the capital and to ports, could not have been satisfied by the parishes, even if their gross rental had been spent in highway repair. Hence the need of collateral aid. The expedient resorted to was the levying a tax upon passengers under the name of toll. But not only were larger funds required, but a better system of management of them also. The toll was an extended application of a principle of taxation known to the law as a branch of the royal prerogative for raising means to support or renew bridges, causeways, and the like structures; and toll was often taken without royal authority. An instance of toll commencing by usurpation is furnished by the Stratford Bridge case. The bow or bridge at Stratford was originally built by Queen Matilda, and endowed with lands to keep it in repair. And because it was thought that the reparation would be better and more securely performed by a religious corporation than by seculars, whose heirs might fail, the lands were given by the Queen to the Abbess of Barking for sustaining the bridge. The Abbey of Barking aliened the land to that of Stratford under the charge of repairs, and reserving a profit over. The Abbot of Stratford committed the repairs to a bridge-keeper, made a house for him on the causeway, and delivered to him a horse and cart for use in the business of repair. But the keeper often required assistance from pas-

sengers, and got it and much profit thereby. And when the Abbot perceived this, he thought that the keeper might do the repairs from such perquisites without assistance from the Abbey, and therefore he wholly withdrew his contribution, still holding the bridge estate fast. Whereupon the keeper caused staples and bars to be made upon the bridge, so that carriages and horses could not pass until they had paid toll, unless they were magnates, and those the keeper permitted to pass toll-free. But though the keeper took the toll, he neglected to do the repairs of the bridge. The Abbot was afterwards prosecuted for not repairing, and ultimately he entered into an obligation to the Crown to do the repairs enforceable by distress on all the Abbey's possessions. (6 Ed. III., A.D. 1213.) A toll for the use of a new private line of road was also known. But to demand a toll for using an existing highway required Parliamentary authority.

A Statute soon after the Restoration (15 Car. II., c. 1) is said to be the first which established the levying of a toll on an existing highway. The district of the roads in that Act (the Great North Road) was extensive, and it was put under the care of the Justices of the Peace of the several counties through which the road ran.

In most of the early Turnpike Acts, Justices of the Peace were the chief administrative functionaries. But Commissioners or Trustees were afterwards substituted for them, with a view to better management. The trustees consisted of the local proprietors up to a certain figure, and the magistrates of the county, and superadded to these a set of named persons, an incoherent and a fluctuating body, but rendered somewhat more select and determinate by a declaration being required, by way of qualification to be made by such as were disposed to act.

It was foreseen in the first Act that costly improvements must be made on the line of road, and in some cases deviations and new branches and connections. Power was therefore given to raise capital on the credit of the tolls. And this may

be taken as a model Act. Hence the turnpike system may be regarded as a special mode of administration, intended to effect the original construction or the re-construction of the way, for which purpose capital was required. That was not to be had without security, for furnishing which, tolls on the travelling public secured the readiest means.

Notwithstanding that good roads served both for the extension of the market for produce and economising the moving power of their horses, toll was to the country folk an odious impost, especially on old highways, and popular outbreaks similar to those which happened in more recent times in Wales frequently levelled the gates and drove away the collectors. By the early Turnpike Acts these violent proceedings were criminal and by General Acts, 1 George II., and 8 George III., such offences were made felony.

It does not appear that the objection of the country people was so much to toll as being the mode of taxation, as to the principle of paying further taxation for parish highways.

The advantages of improved roads were so manifest as to carry the system which promised to give them over these obstacles. In 1745, it was ascertained that the turnpike road from Cambridge reduced the price of the carriage of goods from London by one half. The promise was however, in many places, long delayed, and the traveller's patience was doubly taxed by bad roads and heavy imposts laid on him in the shape of tolls for maintaining them. Still the system made progress.

The Post-Masters General of the day were urgent on the road authorities to improve the roads, in order to facilitate the conveyance of the royal mails. Several millions of pounds were borrowed and spent in obtaining at somewhat lavish cost Turnpike Acts, and the rest in constructing the roads.

In 1818 there were reckoned to be about 20,000 miles of turnpike road, and in 1829 it was estimated that there were 25,000 miles of such road, and that their construction had cost 7,000,000*l.*, equal to 280*l.* per mile.



The progress of the turnpike system was checked when the railway, as a means of through communication, displaced the turnpike road. From the commencement of this change dates the persistent efforts of the Legislature to discontinue the system, to which end certain peculiarities, in the frame of Turnpike Acts, have given facilities.

Turnpike Acts were seldom granted but for a limited period, usually twenty-one years. The Legislature thus retained its hold over the road, but as it never had provided any means of making and maintaining grand lines of communication before turnpikes were erected, so neither did it have in readiness any substitute for the turnpike income or system if it should be discontinued.

The debt for the original construction of the roads, although the security given for it must have expired with the Act, seemed to have all the attributes of permanence, the security holders never clamoured for repayment with that eagerness which men, who see the means of their debtors daily growing more contracted and insufficient to meet their engagements, ordinarily exhibit. The trustees, if they had a surplus revenue, usually preferred to improve their road rather than discharge the debt, and the creditors fully endorsed this policy.

The trustees, when the term of the Act expired, sought for its renewal as a matter of course. Hence there arose a sort of turnpike right of renewal, established by the law and custom of Parliament, as shown in its practice. This became so much a matter of course that the renewal was effected by an Annual Continuance Act for a long period. In 1832, however, the Statute 3 & 4 Wm. IV., required trustees seeking a renewal of their Acts to give to the Secretary of State their reasons for it.

The Government then began to sift the Acts, not conceding, as of course, renewal even to indebted trusts; and when they were renewed a clause was inserted in the Renewal Act, that the Renewed Acts were not to be exempt from the

provisions of any future General Act relating to consolidation or improved arrangement of turnpike roads. Of late the expiring trusts have, by the Renewal Acts, been limited to short periods of existence, some to expire absolutely without reprieve, others unless they can obtain by Special Act a prolongation of the term. Arrangements with mortgage creditors have been facilitated, and competition amongst creditors desirous of being paid off on the downward bidding or lowest tender plan has been promoted.

Several committees and commissions have also reported against the whole system. By the Committee of the House of Commons in 1836 it was reported that the abolition of tolls would be beneficial. The Committee of the Commons of 1864 reported that the "burthen of tolls was unequal in pressure, costly in collection, inconvenient to the public, and injurious as creating a serious impediment to intercourse and traffic." As to inequality of pressure, the riding or driving travellers cannot well be divided into first, second, and third classes; but the pedestrian goes free.

As to the cost of toll collection, 17 per cent. has been given by an observant witness as the expense of collection and management, and 10 $\frac{1}{2}$  per cent. as the expense of highway management.

In the returns, one-third of the tolls paid is set down as the cost of collecting them. These estimates require correction. It is seldom considered that a turnpike gate-keeper, while the system is in full force, is not only a collector but one of the most important members of the police of the road. He keeps the weighing-machine, used not only for the protection of the road from heavy weights being carried at seasons improper, in the sense of being injurious to the road, but for weighing loads of commodities, for the public convenience. He should detect, and consequently prevent, infringement of the laws in respect of width of wheels and other matters which (whether rightly or wrongly is not now very material) were deemed by

such men as Sir John Sinclair, Mr. Curwan, and other men of mark in their day, as of an importance to be strictly enforced. The gate-keeper was also a paid agent of Government for ascertaining the post-horse duty.

It is probable that but for the difficulty of dealing with the debts with which the tolls were burdened the simple remedy of abolition would have been applied universally. Towards the general application of this remedy such progress has been made as to assume the shape of a project of legislation.

In 1867 a Bill was introduced which proposed to abolish debt-free trusts. And as to indebted Trusts, the trustees were to arrange with their creditors provisionally (that is, subject to confirmation by the Secretary of State). On their default the Secretary of State was to act in that behalf. The debts, when the amount remaining was ascertained, were to be apportioned amongst the parishes on the road, according to their expenditure on the highways, and to be charged on their rates. But in partial relief, tolls were to be collected in some cases for ten years, thereafter the roads to be maintained as district highways.

On the other hand, from the partial abolition of trusts the evil has arisen that traffic has been diverted from a tolled road to a disturnpiked road, to the injury of the rate-payers supporting the latter, who see nothing but injustice in a burden being shifted from one line of road continued under toll, because its trust has been mismanaged and its debt retained, to another line disturnpiked, because it has been well managed and redeemed from debt.

In 1866 a circular was sent from the Home Office to trusts seeking continuance demanding more particular information than usual, as to their reasons for seeking such continuance. This was considered a retrograde step. In answer, a large majority of trustees and parishes deprecated abolition. Examination of the subject has worked a conviction in the minds of many persons, that the simple remedy

of toll abolition is not everywhere applicable, that there are cases in which it would work greatly to the detriment of the road in which the public property is fixed, and be productive of more inconvenience to the community than the continuance of the impugned system. It is seen that by parochial rates disturnpiked roads cannot be kept in their pristine condition—a strong argument against abolition of toll, or against such abolition until a substitute fund be provided, since a good road toll-bound is better than a bad road toll-free. It was upon that preference that turnpikes were established, and as a choice of evils they may have to be resorted to again. The trusts objected in their answers to the circular of 1866 to abolition, on the ground that the turnpike roads were good, the highways bad. A trust near Gloucester, called the Over Trust, said of itself, that its road was a great trunk one, in part over a causeway, two miles long, raised on a series of arches to keep it out of flood's way; that the parishes on its line could not keep it in repair, it must gradually fall into decay and be broken down. The lessons of experience were put in requisition—thus one trust remarked that two old discontinued turnpike roads are “in a sad state of repair.”

A mismanaged turnpike trust is an abuse—where, for instance, the repair of the road is neglected and suffered to fall on the parishes. Such abuses ought to be corrected, but in the case of an efficient and solvent trust the sale of its plant, stock, and implements, on the occasion of abolition, is in fact, a sacrifice *pro tanto* of the force for keeping a public road in repair. If tolls are injurious as creating a “serious impediment to intercourse and traffic,” what are bad roads?

The proposal for maintaining turnpike roads by rates has raised the question of the area of rating, extension of which has been deemed the corrective of such an evil as that in a parish the highway rate should be doubled or trebled to maintain the turnpike roads in it. Yet stronger instances of pressure than that are alleged. One wherein the highway rate would be raised from fivepence to two shillings and three-

pence-halfpenny in the pound. Another, where an addition of two shillings and sixpence in the pound would be thereby caused to the existing rate. Many small parishes have several miles of turnpike road, and indeed it is said as a rule, the smaller the parish the greater the length of roads in it. Hence probably the Committee of the Commons on the Renewal Acts of 1867 while they reported their opinion to be that the maintenance of all roads should be by rates, added that the rates should be levied "on districts and not on parishes separately."

Still the burden would be very "inconvenient" to that portion of the public constituted by the ratepayers, although the area of rating might be enlarged. It may be added that it would be very unjust. Take a road between two large towns running through parishes in a highway district. The parishes in the district would have to maintain the road, whose conditions far exceed their own requirements, without aid from the towns, for whose sake probably such road was made, and whose convenience still demands that the same should be well maintained. If the district were as large as a county, the hardship of several places and cases is blended and divided, but not taken away. It is true that the parishes may freely traverse the streets of the town, but save so far as these lie in the trunk line, they are of no more import in such a question than the drive to a gentleman's house. The view of the town-people is, that the country has in such free passage its equivalent, and they seek toll abolition. The view of the country ratepayers is that the through traffickers on a road should contribute to maintain it, and reversing the policy of their predecessors they are opposed to abolition of the gates. At present, say they, the turnpike road is the Queen's highway, open to all men on equal terms—payment of toll—why destroy this equal law to substitute another which exempts non-ratepayers, however greatly benefited, from all shares of the burden? And not only would all non-ratepayers be exempt, but many kinds of properties, the occupiers of which

extensively use the road, would as highway law now stands, be exempt also—such are mines, woods, &c.

Further, the objection of “inequality of pressure” in the rating principle of road maintenance is urged, thus the amount of rate paid by a person has no relation to the extent of his use of the road. Many who use the roads, and do the greatest injury to them, and derive the greatest benefit from them, would contribute but little in rates to their repair—such are contractors, carriers, millers, builders, brewers, &c.

But toll, it is said, is costly in collection. So are rates. In the comparison between turnpike and highway management, the expense of rate collectors is usually omitted. Their percentage or salaries, loss of rates by excusals from poverty, change of ownership, ought to be reckoned in.

In principle the toll tax is not unjust. Indeed, Adam Smith says that it seems scarcely possible to invent a more equitable way of maintaining such works as roads than toll. This tax falls on the consumer, and he gains by the cheapness of carriage on good roads more than he loses by the toll exacted to maintain them. Yet that it is obnoxious to the usages of modern life cannot be denied. Toll may be endurable for a ferry, a navigable canal, or railway, for though they are public in use, in law they are private property. Perhaps even a public bridge may be tolled, but not a highway. The traveller’s objection is rooted in the belief that equal road accommodation can be furnished to him at the cost of others, in which notion, however, it is believed he is mistaken.

It is curious to note the changes which opinion has undergone on the turnpike question. Not only have the town and country parties changed sides in the controversy, as before observed, but toll on roads, which at one time was regarded as a promising means of taxation for ulterior purposes, such as maintenance of deserted children, as well as the service

of roads, is now discredited and reported against, as unfit to be retained even to support its own service.

The case of the country party is not however that road tolls ought to be perpetuated, but that toll should not be abolished until a substitute fund is provided, and that it behoves the abolitionist party to suggest the substitute before the instituted fund is taken away. But nothing has been yet suggested but what is gravely objectionable. Horse taxes, and carriage taxes, or rates, approach nearest to the idea, and it seems hard that such taxes should be exacted from some classes of the community, without any application of any of their proceeds to road expenses. Aid from the State is the most favourably regarded, and some economists have considered that not only could roads be better managed by Government than by private persons, but that Government, by employing soldiers in their repair, might secure a surplus revenue from the tolls.

Adam Smith considered that the turnpike system was capable of being brought nearer to perfection by the management of local trustees having no private interest, under Government inspection and control. There are many obvious advantages in the State having a strong control over main roads. It may be sufficient to indicate public drainage, telegraphy, tramways. For acquiring and retaining such control a contribution from the State might not be an injudicious investment. Provincial and local administration might be continued in subordination to a well-organised State department for internal communication. That highways, county bridges, and main roads should be under the same management is the recommendation of several of the Committee of the Commons, and it is generally acquiesced in. By some, main drainage is added thereto. But this recommendation should be modified, in so far that the toll principle of the turnpike system should to some extent be maintained until a better fund is provided. Again, in the amended system the limits of existing Turnpike Acts should not be so much

regarded as the principle of aiding main roads. If toll be retained, many pieces of road now under those Acts would be disturnpiked, many not under them turnpiked. The number and stations of toll-gates should be revised, the tolls should be kept low so as to answer barely their legitimate purposes of repair and management; in some cases a redemption toll being superadded to clear off debt, but this, as well as compensation to discontinued officers, would be a merely transitory provision.

The usual agency of imperial commissioners might be required to value and apportion debts, and, where management by trustees is continued, to form unions and make other arrangements, and the continual service of the authority of control would be needed to select the main roads to be so aided and governed. By the plan of passes, licences, and free tickets, the impediments to the use of rents in various trusts might be diminished.

These considerations may not be unimportant in the question of the future of turnpike roads, which, though taxed to some, are free to the most numerous class of wayfarers, to whom even the Parliamentary fare of the railways is a prohibition to their use, and to which class above all other classes the deterioration of the road would be an injury: and conversely any increase in ease and comfort of travelling on it an advantage.

---

#### ART. VII.—ON REFORM IN THE LAW OF PATENTS.

AS the rights and claims of inventors, and the law affecting the grant of Letters Patent for inventions, were the subject of Parliamentary discussion during the last session of Parliament, and are expected to be the sub-



ject of legislation during the next session, there seem to be now sufficient grounds for offering some observations to the public on these two questions. 1st. Is it expedient to abolish patents altogether? 2nd. If it is not, what are the principal points on which the law and practice require reform?

That there are some imperfections in the law and practice relating to the grant of Letters Patent, and still greater imperfections in the process of judicial determination upon Patent Rights, is not to be denied. These imperfections have indeed appeared so grave to many persons of eminence (among others, to men of such unquestioned ability and thoughtfulness as Lord Stanley and Sir Roundell Palmer) as to justify an opinion that Patents ought to be altogether abolished, and invention left to seek its own reward as best it can; or else that some mode of encouraging invention should be adopted, other than that which rests upon a grant from the Crown of Letters Patent.

Before going into the several questions affecting the existence of a Patent Law, and the reforms required, if patents are still to exist, it will not be wholly useless to refer very shortly to the origin of the grant of Letters Patent for inventions.

In order to trace the foundation of the Law of Patents, we must go back to an early period of our history, long before mechanical or chemical inventions existed in the land, and when the subject matter of grants by Letters Patent consisted only of dignities and honours, or the more substantial thing, lands—all of which things were then (and some of which are still) in the gift of the Crown, and were granted by the king, by his Letters Patent, sometimes to reward really meritorious subjects, and frequently to gratify mere personal favourites. It is to these ancient Statutes, and to the practice in the granting of Letters Patent at those early periods, that may be traced, among other things, the law which, before the Statute of 5 & 6

Wm. IV., cap. 83, governed wholly, and which ever since that Statute affects to some extent, that which is commonly called "the title" of a patent, viz., the short designation which an inventor gives to his invention, in the petition to the Crown for the grant of Letters Patent. It is also to those ancient Statutes and the practice thereunder, that we must still look for the origin of the legal doctrine that a patent is granted of the grace of the Crown; a doctrine which in those early periods was a reality, but is now (so far as regards patents for inventions) no more than a mere fiction of constitutional law.

The general rule as to the "title" is still the same as it was in the earlier times preceding the existence of invention, viz., that if the petitioner deceives the Crown in any particular of his "title," or short description of the object of the invention, the patent is bad, and may be set aside. The rule in itself is just; and when the grants made, were of dignities, with or without emolument, and *à fortiori* where they were grants of lands, there could be no difficulty cast on the petitioner in ascertaining and describing fully and truthfully what he was asking for. If he wanted a particular dignity, he could perfectly well know and describe it. If he wanted lands, he could perfectly well ascertain their locality, extent, and value. It was, therefore, no hardship upon him to forfeit his patent, if he wilfully misled the Crown. The Crown then did really and actually exercise a discretion in making grants, and patents had to pass through a multitude of offices and official steps, in order that deception, if it existed, might be detected. But when this rule came to be applied to patents for inventions (where the Crown exercises no discretion whatever in practice)\* it worked great hardship; because an inventor, with all the *bona fides* in the world, very often cannot correctly give a correct

\* A patent for invention is now, and has long been, granted, as of course, on the application, and at the risk of the inventor, unless there is opposition by any one else.

title to his invention, till after he has had an opportunity of practically testing it; and as he must give "the title" in his petition, he gives it somewhat in the dark. The rule operated the more harshly until the Statute of Wm. IV., because before that Statute, if the title was bad, there existed no power to amend it and cure the defect; and many valuable patents were in consequence lost. The Statute of Wm. IV. remedied the evil to a great extent, by giving power to the patentee, if he finds out that his "title" is incorrect, to disclaim the bad part, and to amend the specification accordingly, leaving the remainder standing; but he can only do so with the leave of the Attorney or Solicitor General. For instance, suppose an inventor to have stated in his petition that he had invented "certain improvements" in power looms, believing honestly at the time that he had invented three distinct items of improvement; and suppose further research and experiment satisfy him that two of the three alleged improvements are either old or useless. The patent in that state of things is bad. Before the Statute of Wm. IV. there was no remedy whatever; the patent was gone for ever. Since that Statute, the inventor may obtain leave from the Attorney- or Solicitor-General, to disclaim the two items of invention discovered to be old or useless, and the patent may stand for the item left. The remedy provided by the Statute of Wm. IV. is, however, still incomplete in one respect, viz., that there is no appeal from the *fiat* of the law officer of the Crown. He is absolute, and may (and sometimes does) impose conditions in consideration of granting leave to disclaim, which conditions occasionally render the disclaimer perfectly useless in a commercial point of view. It is quite right that some authority should have power to refuse leave, except upon conditions; but as any Attorney or Solicitor General is just as liable to error as a Vice-Chancellor, I would suggest that if patents continue to exist, there should be an appeal from the decision of the Crown officer on a question of disclaimer to the Lord Chancellor.

To return for a moment to the history of Letters Patent for inventions, before discussing the question whether there should be patents at all; and if so, how the law should be reformed?

It is well known that after grants of lands became less frequent (whether from economy on the part of the Crown or not, is immaterial), the power of granting good things by Letters Patent became abused, and the Crown took to granting monopolies to its favourites, for the exercise of common and well-known trades; and that this led to the famous Statute of Monopolies, which has unfortunately been generally considered and called the foundation of Letters Patent for inventions. I say unfortunately, because the taint of the odious idea of "monopoly" stuck to patents for inventions for many generations; nor is that idea wholly yet exploded. In reality, the Statute of Monopolies did not *initatively* give to the Crown the power of granting Letters Patent for inventions. It left the general right of the Crown to grant Letters Patent untouched; but it forbade the use of that power for the granting of monopolies of common trades; and then it excepted out of the anathema, the right of the Crown to grant patents for any manner of new manufacture. So that the Statute, so far from treating grants of patents for inventions as grants of monopolies, did by the very fact of excluding them from the operation of the previous sweeping clauses, treat such patents by implication, as not being monopolies. The taint, however, stuck for a long time to patents for inventions in the public, and even in the judicial, mind, as any one may see if he will take the trouble to read the older cases upon patent rights. He will there perceive the rigid harshness with which both the title and the specification were then construed. In more modern times (commencing about with the period of Mr. Watt's valuable inventions) a different view has prevailed. The courts of law have acted upon the principle of treating useful inventions as a public benefit; and have treated, and do now

treat, patents on the liberal footing of construing the title and specifications as far as is practicable, *ut res magis valeat quam pereat*. Nevertheless, there still is a sort of lingering notion in the minds of many persons, that patents are a kind of monopoly; it being difficult to some minds to cast off the prestige of a name, and to distinguish between its meanings, as applied to different subjects.

Now, a monopoly in its true meaning (I do not, of course, refer to its lingual derivation, but to its true political and commercial meaning) is precisely the sort of thing to which the prohibitory sections of the Statute of Monopolies were addressed, viz., an exclusive right given to some person (who gives nothing to the public in return) to carry on some trade which all the world had carried on before. For instance, if the Queen could now grant Letters Patent for the exclusive sale of 12s. claret, or for the exclusive manufacture of felt hats or paper collars; that would be strictly a commercial and political *monopoly*. But the notion of monopoly in that offensive and mischievous sense is quite inapplicable to Letters Patent for inventions. In one very limited sense, such patents are no doubt a monopoly, that is, in so much as they give an exclusive right of user for a given time. But that species of monopoly is quite distinct from a monopoly proper. Patents for inventions are not in fact (though they are in point of technical law) grants of the mere grace of the Crown—they are granted for a *quid pro quo*. They are granted by the Crown (representing the public) for this consideration, viz., that the public shall enjoy the reversion of the invention, after the expiration of the patent, for general use. The transaction is in every sense a bargain or contract, which the public, with its eyes open, makes with the inventor. I press this point particularly, because it is of the utmost importance that the notion of a patent being a donative, a gracious reward to the inventor, should be thoroughly dismissed. A patent is not a *gift* to the

inventor; it is a *bargain* with him, that if he will relinquish to the public at the end of fourteen years, something they did not know of before the grant, and perhaps *never* would have had at all but for the inventor, the public will guarantee him a special and exclusive lease for fourteen years. Nothing can be more unlike a gratuitous monopoly than this.

I will now proceed to consider the first of the two questions above referred to, viz., Will it be expedient to abolish patents altogether, and to substitute nothing; or to substitute some other scheme in their place?

The solution of this question must depend mainly upon a correct appreciation of the nature of invention, and of the mental constitution of inventors. Sir R. Palmer in his speech on the subject during the last session of Parliament, drew a distinction between the work of an inventor, and that of an author; treating a book as a *creation*, and an invention as the mere application of the facts and laws of nature. I venture, however, to submit to the reader, with great deference to so high an authority, that there is no substantial foundation for such a distinction; that there is no such thing as *creation* emanating from any human mind; the author does not create *new ideas*, any more than the inventor creates *new things*. Each of them finds out some hitherto unnoticed idea, or combination of ideas, or of facts existing in nature; the only difference between them being, that the author deals principally with *ideas* more or less connected with *matter*; while the inventor deals almost exclusively with *matter*.

And now let us consider what manner of man an inventor is, and whether he differs from other men, in the ordinary motives which govern mankind. An inventor is, as I apprehend, a person who is gifted by nature with what I may venture to call mechanical or chemical ideality—an innate faculty of contrivance and combination, which, coupled with more or less of knowledge, enables him to find out some

thing or things in nature, before unnoticed ; or some combination before unnoticed, of things before known. In these mental respects, the mechanical or chemical inventor differs from the author and the musical composer (who is of the species, author) not in the quality of his mind, but in the subject matter to which his ideality and contrivance address themselves. The author draws upon his imagination and observation, and either evolves previously unnoticed ideas, or puts together known ideas, in a new and agreeable form of combination. The composer draws upon *his* imagination, and *his* observation and knowledge of the effect of sound, and finds out a combination, not before made, of the sounds capable of being expressed by the notes of musical notation. The inventor (as the very term expresses) *finds out* some hitherto unobserved, but always possible, combination of mechanical or chemical elements ; but neither the author nor the composer nor the inventor ever *creates* anything. The mental processes are the same in principle in all the three classes, the difference of results arising merely from the difference between the objects to which the inventive or discovering faculty is applied. The pursuits of all these three classes of men are also in another respect similar, viz., that they all require the application of knowledge, time, and industry ; and all require some outlay of money. But there is one very practical difference between their pursuits, viz., that while authorship, that is, the actual composition of a book (except perhaps as regards scientific books and histories) or the composition of music, requires in general very little actual outlay ; the bringing of an invention to perfection, that is, into actual and effectively working order, almost always costs a great deal of hard cash. I do not, for instance, suppose that the actual writing of "Childe Harold," or of "The Talisman," cost Lord Byron or Sir Walter Scott much money. But when you come to deal with unavoidable experiments, made with such costly materials as metal worked into the shape of models or machines ; or with

chemical ingredients, and all the paraphernalia of chemical implements and tests, the case is widely different; and mechanical or chemical inventors can rarely make much progress unless they, or their backers, have a good account at their bankers.

It is a total, though a very common, error to suppose that inventions fly out of a man's head ready made and complete. Nearly all the valuable inventions that have substantially advanced either mechanical or chemical industry have been the result, no doubt, originally, of some spontaneous inspiration, suggesting the *germ* of the invention, and no more; but they have almost invariably required not only long thought and labour, but costly experiment, before they have assumed the practical shape of workable machines or processes. Let us just take the ordinary routine of converting a mechanical idea into a practical machine. If a man invents a new machine, or new movements to be applied in combination with the other parts of an old machine, the first thing he does is to put his ideas upon paper in the shape of a drawing. If he could stop there, and safely take out a patent, he would certainly not incur much expense; but if he is a true mechanic, and not a mere *dilettante*, he knows perfectly well, that things which look very pretty in a *quiescent state* upon paper, may and mostly do assume a very different aspect when put into the form of *solids in motion*. He, therefore, proceeds to make a model, and discovers defects. The model must be taken to pieces and altered, and this process may, perhaps, require several repetitions. Still, though the model may ultimately show good results, a mechanic knows further, that momentum, friction, and other incidents to all forcible mechanical action, have a very different effect upon the working of a full-sized machine from that which they have on a tiny model; and that he cannot rely that his invention will work till he has tested it on a large scale. Then comes a repetition of the tentative processes employed upon the model, and the machine may have to be taken to pieces



and put together again half a dozen times before it can be termed thoroughly a "going machine." Then, and not till then, can the inventor venture to proceed with a patent, unless he means to pay for an imaginary right.

I believe I shall not be at all exaggerating, when I say that in cases of mechanical invention, the expenses before the machine can be actually brought into use, are seldom less than 1000*l.*, very frequently from 5000*l.* to 10,000*l.* I am, of course, speaking of inventions of a substantial order, in the construction of machines used in important manufactures, such as power looms, cotton and lace machines, steam boat or locomotive machinery, and the like; not of the class of petty inventions, such as a new button shank, or a new cork-screw, &c., &c.

Now, it is tolerably certain that no inventor would, after all this labour and expense, *give* his invention to the public for nothing. But if the public will make such a contract with him, as that which is made by Letters Patent, then he will accept it; but if no such contract, or no contract of some other kind, guaranteeing to him the fruit of his labour can be had, I think there can be but little doubt that no inventor worth the name, would ever take the trouble and expense of inventing at all.

There are some persons who seem to think that men, gifted with the inventive faculty, cannot help inventing; and that they would be willing to spend time and money in inventing and perfecting their inventions for mere honour and glory, and without any contract for securing to them a pecuniary remuneration. There may be a few such *rareæ aves*; but I must say that it is not consistent with my own experience of inventors (and I have seen a good deal of them) to attribute to them such a total abnegation of self—such a contempt for worldly goods. And I believe most experienced patent agents would confirm me in saying that inventors, as a body, are very much like other men. They like fame, of course; so do most men; but like other men, they like it to be accom-

panied and sweetened by the solid advantage of increase of pecuniary means, and they look to that species of return for their labour just as much as other men.

The foregoing views, if correct, bring the matter down to two questions. 1st. Is it for the benefit of the public that inventions should be made? 2nd. If it is, is there any species of contract better adapted than Letters Patent for settling the relation between inventors and the public?

The first question is not worth arguing; I apprehend it is conceded on all sides, that it is for the benefit of the public that inventions should be made.

As to the second, I am not prepared to contend with the philosophic Candide, that "*tout est pour le mieux dans ce meilleur des mondes possibles.*" I will not contend that because patents *are* now, they must be for *all time*. But it is reasonable to contend this, at least, that it would be injudicious to abolish them until a better mode of obtaining good inventions for the public is devised. And that brings us to the consideration of the only suggestion of a substitute for patents of which I am apprised.

The plan suggested is the establishment of a sort of Government Board, with power to apply public money in buying inventions. It is not quite clear, from what has been said and written in this plan, whether it is proposed that the Board should determine *à priori*, before the invention is made public, as to purchasing it; or whether it is proposed that the invention should first be made public, and run its race of success or failure, before the Board is to consider the question of purchasing it; both propositions must therefore be dealt with.

If the first is intended, it seems open *in limine* to two fatal objections. 1st. Inventors of the best class would have no confidence whatever in the justice or secrecy of such a Board. They would refuse to submit their inventions to the examination of a Board of Commissioners and a staff of clerks, entailing upon them all the risks of want of judgment in

such a tribunal; and of the carelessness, of which Government offices, with all their pretensions to great exactitude, are not wholly innocent.

2ndly. No man or set of men however scientifically informed, can judge *a priori* what is the fair value of an invention not yet subjected to the test of practice. Nothing but trial can ascertain the fair value of an invention to the public. An invention may appear at first sight, even to the most scientific, to be most important, or most unimportant, as the case may be; and yet the judgment of those best qualified to form an opinion, may be reversed by the results of practical trial. So that the Board would inevitably run the risk of frequently granting money for worthless inventions, or of refusing to buy really meritorious inventions.

If the second is the plan proposed, viz., that an inventor should bring his invention into use, and show the utility of it to the public, before the Board is to entertain a proposition for purchasing it; the objection to that seems equally fatal. What inventor would take the trouble to invent and spend money in perfecting his invention, and throw it open to the public, relying upon the liberality of a grateful Government? Inventors of improvements in warlike implements, which the Government has a right to use (subject to rewarding the inventor as it shall think fit), have had quite sufficient experience of the munificent rewards given by the State, to warn any inventor in his senses, against leaning upon such a broken reed as the liberality of any government.

There is another objection, which is one of public policy, to the whole scheme of applying public money for the acquisition of inventions. Public money means, of course, money drawn from the taxes; and the broad principle of government in this country has always rightly been, that the fruit of the taxes should only be applied in payment of those classes of service from which the *nation*, and not a particular class, either alone or principally, derives benefit. A War Department, a Home Department, Courts of Justice, and

the like, are public institutions for transacting business from which the whole *nation* derives, or is assumed to derive, benefit. But if public money were applied to buy inventions, it would be paying out of the general taxes, for a benefit that is in general principally enjoyed by one, or more, class or classes, and not by the whole nation. Suppose a man to invent an improved plough or threshing machine; who are the persons principally, if not exclusively, benefited? The farmers and those connected with farming, and the makers of the machines. Suppose the invention to be for better preventing the incrustation of marine boilers. What imaginable interest in the results of that invention, have the farmers, and the cotton spinners, and their workpeople?

I am of course quite aware that, according to the theory of political economy, every advance in industrial art of whatever kind, adds ultimately to the aggregate wealth of the nation; and that in that extended (though somewhat theoretical sense) useful inventions are a national affair. But if that doctrine of political economy were carried out to its extreme and legitimate extent, there would be equally good reason for paying a first rate surgeon or physician out of the public money; on the ground that, though the immediate application of his skill only directly benefits his patients, the broad and ultimate result of his knowledge, spread by degrees among the medical profession, is a national benefit. At any rate, if such a scheme as the suggested Board were carried into effect, it would be the first time in our history, that public money has been directly applied to pay for work, not properly work in which the nation as a whole is interested.

And now let us consider, as contrasted with this scheme, how patents work as between the public and the inventor. Be it remembered at the outset, that the public pay nothing for an invention unless they get their *quid pro quo*, of a valuable reversion, for the temporary privilege. If the invention really adds to the stock and improvement of manu-

facturing industry, the public gets the full benefit of it at the expiration of the term. If the invention turns out a failure, the public loses nothing of what it had before. On the contrary, the State gets the fees paid by the patentee, for a worthless piece of parchment and wax. Can a more advantageous bargain be made on behalf of the public?

I pass on to consider some of the arguments that have been used in support of the abolition of patents (and that by men whose opinions deserve the greatest possible respect and consideration). One objection is based upon the assumption that, looking at the multiplication of patents, and looking at the costliness of trials of patent rights—firstly the trading public is vexed with innumerable claims by patentees, which interfere with the freedom of trade; and, secondly, that patentees themselves as a body are not, *de facto*, much benefited by patent rights; so that every one would be better off if there were no such thing as a patent right.

It is very difficult to deal with these questions exactly, owing to the absence of reliable statistical knowledge as to the facts. It may be quite true that a great number of tradesmen, who do not hold patents, are very angry at not being allowed to use the patented articles. So, I dare say, that there are a great many barristers who lament (barristers are too polished to be angry), that while some men's tables are groaning under a fearful load of briefs, their own are almost without papers. But it does not, therefore, follow that in either case the complainants *ought* to enjoy the good things which they have not earned as well as their competitors. It may be, and in fact is, true that there are innumerable patents for trivial inventions, which are, or may be, used for the purpose of vexation, and perhaps of a species of extortion, by the threat of legal proceedings, long after the inventions have ceased to be of any commercial value. And it may be, and I am quite ready to believe is, true that patentees, as a body, are not much benefited by the grant of patents. But

that is a circumstance which does not apply to patentees only, but to almost all classes who live by their brain-work. Physicians, barristers, solicitors, architects and engineers, all as classes, are liable to the disadvantage of not making a living by their professions. A few make splendid fortunes, but the majority earn a bare subsistence. The reason in all these cases is the same. Amongst all workers a decent mediocrity is the rule, great talent and energy the exception; and the public cannot be expected to pay, at any rate it never does pay, very highly for mediocrity. It is often observed that out of the vast number of patents that are granted yearly, not one in a hundred ever comes to anything. The reason of this is, not that the inventions are protected by patents, but that ninety-nine out of a hundred are worthless inventions. The same thing may be said of literature—out of all the books published every year, not one in a hundred is successful and profitable; but no one ever refers to that as a ground for abolishing copyright.

There can be no doubt that the inventors of worthless inventions, that is, persons who have really no inventive power, would be benefited if there were no such thing as a patent to tempt them into a career for which they are not fitted; and so would the writers of stupid and foolish books be better off if they were protected against their own folly, by there being no such thing as copyright. But the function of legislation is, I apprehend, not to protect foolish people against their own folly, but to protect able and hard-working people in the enjoyment of the fruit of their labours. And the question is thus brought back to this. How is the public to obtain the benefit of real improvements in manufactures, if they will not enter into a contract of some kind to secure a return to the inventor? Some such contract is absolutely essential; for one might as well expect a barrister to hold briefs without fees, or a journeyman to work without wages, as expect that an inventor will spend long periods of unproductive industry and a good deal of money besides, and then literally *give* his

production to his rivals in trade, who can, of course, undersell him, unless he is willing to lose all the time and money he has expended.

There are some persons also who hold an opinion (or at least have a kind of hazy notion) that inventions could be kept secret; and that thus an inventor might reap his reward without the cumbrous machinery of patents. If this were possible, it would be so much the worse for the public. For if the original inventor could keep his invention secret, so could his son and his grandson, and there might be a perpetuity in exclusive right, instead of the modest fourteen years granted by a patent. But, in truth, secrecy is not possible. As to mechanical inventions, the impossibility of secrecy is self-evident. When a machine has once been made and sold, its construction becomes very rapidly known, and any one can copy it. As to chemical inventions, the powers of chemical analysis are now so extensive, that it must be a very extraordinary chemical invention that would baffle the skill of an experienced analytical chemist. Indeed, so far is this recognised that, as lawyers know, in proceedings against infringement of patents for chemical inventions, the report of a chemist, founded on his analysing the alleged infringement, that he finds in it traces of such and such ingredients forming the basis of the patented invention, is received as *primâ facie* evidence of infringement, which the defendant is called upon to rebut. On the whole, the idea of protecting inventions by secrecy must be cast aside as wholly without foundation.

I venture, then, to conclude that if the public wants to have the use of good inventions, it must pay for them in some form; and that until some better scheme can be suggested than has yet been suggested, for the regulation of the relations between inventors and the public, it would be inexpedient to abolish the contract made by Letters Patent. They have at least this advantage, that as the inventor only gets paid out of profits on the manufacture, the public pays nothing unless the invention is substantially useful. If it is not, they simply

do not buy the patented article, and both parties to the bargain remain in *statu quo*.

Assuming that patents will not be, at any rate at present, abolished, I pass on to the questions, wherein the law and practice are defective, and what suggestions for improvement may be made. And I will first deal with the question of the expense of obtaining patents. Here I must encounter the risk of stating a proposition, which I fear will be unpopular, but which may nevertheless be found upon examination to be sound; viz., that it is not to the advantage of inventors, or the public, that patents should be very cheap. The great reduction of late years in the expense of obtaining patents as compared with what it was before the Statute of Wm. IV., has, I venture to think, so far from doing good, done a great deal of harm. It is that very cheapness of patents, which has caused the multiplication of patents for infinitesimal inventions; patents, which have done little or no good to the patentees, and which have brought about the very inconveniences to ordinary trade, which were alluded to in the House of Commons, viz., that the ordinary tradesman finds himself so surrounded by patents, for almost every conceivable article, that he hardly knows what he may use without having a Chancery Bill filed against him.

In order to discuss this question of the price of patents satisfactorily it will be necessary to examine a little more minutely the mental qualifications of the class of men called inventors. That class may be divided into two broad classes, subject of course to some intermediate classification. 1st. Those who have grasp of mind, and ability and knowledge enough, to make great or considerable steps in invention. And 2nd. Those who are possessed of an active power of minute invention, and no more.

The productions of men of the first type are those which alone will render a patent commercially valuable. If a man makes a great or considerable step forward in the construction of a machine, or in a chemical process, the improved machine



or process will bear a higher price in the market than the old machine or process; and such inventions would bear the expense of a patent if it were three times as great as it is; but a minute invention of detail gives *singly*, hardly any appreciable superiority to the machine or process to which it is applied. A great many of such little inventions clubbed together, will give an appreciable but not very marked addition, to the value of the machine or process. But taken singly, no such inventions are worth the expense and loss of time attendant upon bringing them out and working them under a patent, even if the patent itself could be had for nothing.

The second class of inventions are, in fact, not properly the subject of patents at all. A great many of such inventions are made by what are commonly "ingenious workmen"—a most valuable class of men, but generally men without capital, and without backers who have capital. Such men would advance themselves more in life by getting a reputation for ingenuity, and so gradually rising in employment and wages, than by taking patents, and it would be a boon to them, *positively* to discourage them from taking patents, by *high price*. When inventive genius of the first class develops itself in a working man (and that occurs not unfrequently) he has no great difficulty in finding backers, who will assist him in taking out patents, and in the expenses of perfecting his inventions; of course, with a contract for a beneficial share in the result. But woe be to the merely "ingenious workman," if he plunges into the mania of taking patents. If they were to be given to him for nothing, they would be his ruin; because the attempt to bring his inventions into use would soon eat up all his little means, besides withdrawing him from regular industry.

I pass now to the consideration of the mode in which the law is administered in trials of patent rights; and here there is indeed much ground for complaint and improvement.

For the information of those readers who are not lawyers,

and who, if patentees, have not gone through the fiery furnace of a trial, I will very shortly state how such a trial is conducted, trusting that the portrait will be recognised by those lawyers who are in the habit of conducting trials of patent cases. I pass over the preliminary pleadings; they differ scarcely at all from ordinary pleadings in any important case. I pass over also the preliminary expenses of models, drawings, &c., &c., for the purpose of explanation; they are often heavy, but they are unavoidable; they belong to the very nature of the subject matter, and no legislation could regulate that source of expense. I pass, therefore, at once to the trial itself, assuming all necessary preliminary proceedings to have been taken.

The trial may be either at law, of course with a jury; or it may be in Chancery, with or without a jury, as the parties may elect, or the judge may require. In general, if the parties agree, the Court will not (though it may) require a jury; and in general the parties do agree in Chancery to dispense with that cumbrous appendage.

However, whether there is or is not a jury, the case is determined, as to the facts, upon the evidence of scientific witnesses and experienced manufacturers, whose attendance is voluntary and very expensive. That expense also could not be *wholly* avoided by any legislation that I could conceive, inasmuch as it is impossible to dispense with such evidence; and it would be unjust and impossible to take scientific men away from their own lucrative employments, without adequate compensation. But the evil that results from this necessity is, that almost invariably the witnesses on the two opposite sides, contradict each other as to the material features of the invention, and more especially as to whether what the defendant does, is or is not an imitation of the thing patented. And on both sides the witnesses plunge of their own accord, or are skilfully drawn by counsel, into the exposition of scientific theories, till everybody, including the judge, is puzzled. The judge may be, and

frequently is, something of a mechanician, or a chemist, as the case may be. But no judge can be expected to be as thoroughly up in all the scientific and technical questions raised before him, as if he had spent his life in studying science instead of law. He has no independent and thoroughly impartial scientific person to assist him, and he must pick his way as best he can through the mass of contradictory opinions thrown at his head.

If the case is tried by a jury, it is worse and worse. In general not any of the jurymen have even a smattering of science, or any practical acquaintance with either machines or chemistry. Most of them in general do not even know the meaning of the most ordinary terms of art; or, in respect of machinery, the use of the most common mechanical instruments; and they get utterly bewildered by the clash and clang of scientific terms, and the contemplation of instruments which they have never before seen, till at length they hardly know whether they stand on their heads or their heels. And this is the happy-go-lucky way in which the facts are disposed of before a jury.

Then come frequently questions of law upon the construction of the specification.\* These are after argument left to the judge, and here at last he is at home. But then the judge is bound by iron rules of construction. He must construe the specification as he would any other written document; that is, he must construe it as a lawyer, and must apply the critical analysis applicable to other legal instruments, to a document which never was written for

\* It has been more than once suggested by a noble and learned lord of the highest eminence, while presiding in the Court of Chancery, that the questions on the specification should be argued and determined first, before going into the facts; because frequently that course would make it unnecessary to discuss the facts. With the greatest deference to so high an authority, I venture to submit that in the great majority of cases, that course would be impracticable; because in most patent cases, until evidence has been given upon the nature of the invention, involving full explanation of the terms of art used, and of the drawings and models, the judge would not have the requisite materials in his mind, for construing the specification.

lawyers, but for the practical instruction and guidance of mechanics or chemists. If the language of the specification is in any degree obscure, or technically defective, it is of no use for the witnesses to say that they understand it, and are not misled. The Court has no alternative ; it *must* construe the specification according to the strict import of the words used. It is hardly necessary to say that numerous valuable patents have fallen under this severe ordeal. A remarkable instance of this sort of thing occurred a few years ago. The specification of an invention described, according to the strict construction of the language used, two alternative processes—one of them was admitted to be useless. But all the witnesses on both sides, except one, said that they were not misled—that they understood the specification as indicating one of the processes, viz., the useful one, and that they passed over the words indicating the other, as so much verbiage—as, in fact, having no influence upon their minds in producing the result. Still there were the fatal words, and the Court decided that two distinct processes were described, and that one of them being useless, the patent was bad.

Now, I venture to submit that the application of the strict rules of construction to specifications works a hardship upon inventors, and that it might with advantage be at least somewhat, relaxed. It must be remembered that a specification is a document of a very peculiar description. It is hardly in any respect like a deed. A deed is prepared by lawyers, well acquainted with the exact meaning (fixed by long usage) of the language employed ; specifications are mostly prepared by gentlemen pursuing a special profession, more allied to science than to law. Moreover it must be observed that, though hardly two law deeds are ever exactly alike in the arrangements they make, yet they are all alike substantially, if not strictly, in the use of what are called the “operative words.” While from the very nature of the subject matter, no two specifications *can* be alike, as each

has to describe and define something which was never described or defined before. It is much more difficult, even for an experienced lawyer, accurately to define a new invention, than to define a particular limitation of property, even though it may be an unusual limitation. How much more difficult, then, must the task be, to a patentee, or to a draftsman not trained to accuracy of language, as a lawyer is. Further, it should be borne in mind, that all that is required in terms by Letters Patent is, that the specification shall describe the nature of the invention and how it is to be carried into effect—language from which it is to be inferred, that if the instructions given in the specification are such as practical men understand—such, that following those instructions, they can make the thing patented, the terms of the grant are complied with; the practice is, however, as lawyers are well aware, not so—the practice is, that the construction, that is, the meaning of the document, is not to be taken from the evidence, but must be taken from the internal language of the document, construed by the judge with the same strictness with which he would construe a deed of settlement.

The injury which this rule inflicts on patentees is not confined to them, it extends to the public; for it happens sometimes that when a valuable invention is set aside the whole thing drops out of use, just as if there had never been such an invention; and for this reason: Infringements rarely wait till an invention has got *thoroughly* into use. They begin when the invention, under the paternal exertions of the patentee, is *beginning* to get into use; and if the patent is then set aside, the probabilities are that no manufacturer finds it worth his while to alter his patterns and his tools, in the face of general competition; and so the invention drops into oblivion. The manufacturer, if asked for a machine like what the patent machine was, will probably make some excuse for his not making it, grounded on an intimation that the invention was not so useful as it was thought to be; his

real reason being, that as long as the public will buy the old machine, that pays him better than to make the new machine. It requires, in fact, the extra interest that the patentee has in pushing a new thing into use, to get it firmly established in public estimation. Therefore, the upsetting of a patent for a valuable invention, upon technical grounds, does mischief generally.

Now I do not propose to suggest as a remedy that the construction of a specification should be taken out of the hands of the Court altogether, and left to the evidence of practical men; that would lead to more carelessness and looseness in specifications, than there is already, and would undoubtedly cause mischief. But I venture to think that it would be advantageous if the judge were at liberty, if he should think fit, to accept as the true meaning of the specification, the meaning put upon it by the weight of evidence. In the case that I have before referred to, the learned judge expressed his regret at being obliged to decide as he did, and would, probably, if his judicial duty had permitted him to do so, have adopted the view of the mass of the witnesses, as to the effect of the specification.

With regard to what may be a remedy for the defects pointed out in the mode of trying patent cases, we need not invent a remedy, for we have a precedent to guide us in the practice of the Court of Admiralty, in trials of questions of navigation (collision and the like). There the judge, who is most wisely not presumed to be an accomplished seaman and navigator because he is an accomplished jurist, is assisted by practical men quite unconnected with the parties, who act judicially as assessors, to assist the judge in threading his way through conflicting technical evidence. What substantial difficulty could there be in introducing this system into our Courts of Law and Equity in patent cases? If the judge were provided with the assistance of two or three scientific men acting as assessors under

judicial responsibility, it is almost certain that a great part of the expense of patent trials would be avoided. I do not put this forward as my own suggestion; it has already been suggested. At present each party is, as it were, compelled to call a cloud of witnesses to support his views, because if he brings only two witnesses to testify to *his* being right, and the other side brings twenty to testify that *they* are right, the weight of testimony is likely to carry the day; consequently each party retains as many experts as his pocket will permit. It is true that in practice, at least in the Court of Chancery, seldom more than two or three are examined at length, and the others are only called to say whether they agree or disagree with the witnesses previously examined.\* But all must be retained and paid, and patentees know full well what an expense that creates. But if the judge had assessors, the parties and their advisers would perfectly well know that he would rely more upon their opinions as to the questions of science, than upon a perfect army of witnesses retained by the parties; and under such a system, the parties would certainly be advised to retain only just so many witnesses (say two or three) as would be required fully to explain their view of the case.

There may appear at first sight some little difficulty in obtaining competent assessors, owing to the continuous and profitable engagements of men who would be fit for the duty; so that it would be impossible to obtain the services of permanent assessors without salaries, such as Parliament would certainly not give. But I venture to suggest that the following plan might be adopted without any very grievous expense. Let a certain number of engineers and chemists, say fifteen or twenty engineers and five or six chemists (trials of mechanical patents bearing about that proportion to cases on chemical patents) be

\* In the case referred to by Sir R. Palmer, in his speech in the House of Commons, *Young v. Fernie*, this practice was not followed, but nearly all the witnesses were examined at length; and that course of proceeding was the reason of the great and exceptional length of time occupied.

appointed by the Lord Chancellor, as a sort of standing committee of experts, from which to select assessors as occasion should require. And on any trial, let two or three of the body, be selected by the judge who is to try the case, to attend and act as the judge's assessors—the assessors to be paid by the State (not by the parties) a liberal fee for each attendance. It would most probably be found that out of the number there would be always some accessible; and the honourable position would of itself make the office agreeable even to eminent men.

There are two other questions which have been mooted, and which require notice. I allude to the suggestion of trying patent cases by a board or committee of scientific men; and the suggestion of a special court for trying such cases.

As to the first suggestion, the more it is considered the worse does its aspect become. Scientific men are, as a body, even less acquainted with law than lawyers are with science; especially are they wholly innocent of the laws of evidence. Now, it is impossible to keep clear of legal questions in patent cases, and upon those a board of scientific men would be utterly at the mercy of counsel. In addition to this, there is a second objection. Scientific men are apt to have what are called professional crotchets; specific modes of thought upon certain subjects; and they are not trained, as lawyers are, to throw out of their minds all personal views of a subject. So that with every honest disposition to be fair, they would be liable to substitute their own preconceived notions for facts, and to judge rather upon the dictates of their "inner consciousness" than upon the evidence before them.

As to the second suggestion of a special Patent Court, there are objections, the first of which seems fatal to the plan, viz., Where are we to get permanently a judge who shall be accomplished in science and also in law? The union of the two qualifications is so rare, that though at this present moment, a lawyer possessing them might be found,



it would be difficult to say whether a successor could be found. And if the judge of a court for patents is to be just like any other lawyer, *cui bono* a special court? Farther, the continued attention to one branch alone (and that but a small one) of the law, is apt to narrow the mind, and to diminish, if not to destroy, whatever breadth of grasp may originally have existed in the mind of the judge. And, lastly, a Patent Court would be shut for half of the year; as there is not business for such a court for six months in the year.

I come now to the last question which I propose to discuss in these pages, viz., the question of the mode in which the law deals with the grant of licenses. At present, a patentee has absolute power to grant or withhold licenses at his pleasure; and that power is liable to abuse in this way, viz., that it enables a patentee, if he is a large capitalist, or several patentees in combination, completely to crush rivals in their own trade; meaning by that, not merely to exclude a rival from using the invention, but absolutely driving him out of or materially crippling his own business. And instances have occurred, where several firms in the same trade have bought up all the patent rights they could lay their hands upon, and then formed a sort of company, which, by refusing licenses to use any of their patents, created a practical monopoly, crippling the ordinary business of their rivals. Such a result is certainly not within the spirit of the law, though it may, by skilful drawing, be brought within its letter.

Now I apprehend it would be no improper interference with the fair and just rights of patentees, if they were bound by the terms of their patents, or by special enactment, to grant a license to any one desiring it, upon such terms, as to price or royalties, as might be agreed upon; and if the parties could not agree, then, upon such terms as should be determined by a jury; following the precedent which has worked very well in railway matters, where a company

takes land compulsorily, and the parties cannot agree upon the purchase money.

I have purposely abstained in this paper, from touching upon questions of reform in the official routine of granting patents, recording specifications, &c., &c. Those subjects are within the province of the officers of the Patent Office and of Patent Agents, and come very little under the observation of a lawyer.

C. S. D.

---

#### ART. VIII.—NATURALIZATION AND ALLE- GIANCE.

**A**S blue books are not extensively read, the one which contains the Report of Her Majesty's Commissioners on the above subject might have failed to excite so much attention as it well deserves, but for Sir A. Cockburn's able commentary. We avail ourselves of the attention thus stimulated to consider such part of the Report as tends directly to affect our international relations, in the character, which it may shortly bear, of materials for British legislation.

We may assume, as essential to any rational measure on this subject, the endeavour to obviate those conflicts which now arise between nations on questions of nationality, by the establishment of some uniform rule. Such an end obviously cannot, as the Commissioners remark (see Report, sec. 7), be attained, otherwise than imperfectly, by British legislation alone; requiring as it does the co-operation of foreign governments and legislatures. They accordingly recommend that efforts should be made to procure reciprocity between ourselves and other countries upon the principles involved; pointing out, as means to such reciprocity, agreements or conventions with different states separately or, better still, a

general understanding to be arrived at, in conference or otherwise, by the powers most interested in the subject. A corollary to this excellent advice would seem to be that, before an arrival at the general understanding desired by the Commissioners, individual nations should be very cautious and sparing in positive enactment on the subject of nationality. We shall do well to clear away difficulties or prejudices arising from assumptions that we can afford to abandon, or disabilities that we can afford to remove; but we should be careful not to increase the intricacies of a complicated subject by new rules, until some agreement as to such rules between ourselves and foreign nations has been arrived at, or at least attempted.

Meanwhile, time will not be wasted in considering the measures proposed for settling the question of nationality, with regard to their intrinsic reasonableness, their practical convenience, and their likelihood of being accepted by foreign nations. No Bill can be of much use as a contribution to international law which does not fairly satisfy these three requirements.

First, let us inquire into the rule for determining nationality of origin. Here the Commissioners are at variance. The majority would, as to children born in British dominions, retain our Common Law rule, which makes such children, though of alien parents, British: allowing, however, the condition of alien to be claimed by registration. But, in the case of children born to British parents abroad, the same majority adopt the other, or, speaking roughly, continental principle which makes the nationality of the child depend upon that of the father. From the first recommendation Sir George Bramwell, Mr. Bernard, and Mr. Vernon Harcourt dissent, the two former briefly stating their objections, the last urging at some length, in a very forcible paper, his reasons for preferring the principle involved in the majority's second recommendation.

On the abstract or natural justice of the one rule or the other we do not mean to enter. Mr. Vernon Harcourt has,

to our mind, sufficiently demonstrated the superior reasonableness of the continental view; but the regulation of points of this kind is so obviously and entirely within the competence of each human legislature that to claim, as many foreign writers do, an exclusive natural or moral sanction for one's own favourite principle is merely to import an unnecessary acrimony into the discussion.

An inconsistency, however, of principle, such as is shown in the double recommendation of the Commissioners, must strike the mind as a very formidable objection, especially if calculated, as Mr. Vernon Harcourt (pa. xiii.) shows, to lay us, with foreign nations, under the suspicion of seeking an unfair advantage.

As to the likelihood of the one or the other principle being accepted abroad, there is no doubt about the rule which determines the child's nationality by the father's being that which finds most favour with continental nations; nor do we see in the writings of their publicists, the least sign of reverting to that older doctrine which we and the Americans retain as to children born in our own country, though we run counter to it as to those born elsewhere.

There remains the question of practical working. The convenience of settling nationality of origin by locality of birth is undoubtedly great. The qualification being a matter of mere fact, and of a necessarily exclusive character, is capable of easy proof, and is not capable of producing what all wish to avoid, double nationality. Still, we must agree with Sir A. Cockburn in questioning whether this advantage is "such as to outweigh that of removing the existing conflict of laws and the confusion arising from it, and of bringing our own law into harmony with that of other nations." ("Nationality," p. 193.)

Granting, however, descent to be both a more reasonable and a more generally recognised ground for fixing a child's nationality than the accidental locality of birth, we still, surely, find our difficulty only removed one step back. The

child's nationality being determined by that of the father, by what is the father's determined? By *his* father's, and so on, to Adam? This is absurd, but it is clear that except in the rare cases where some acquired nationality can be proved, we *must* adopt some qualification of the parent, as the source of the child's nationality, other than that parent's own nationality by descent.

What is this other qualification to be? Mere repute, over however many generations, would scarcely satisfy a nation with whom we might be at issue as to the descendant's nationality. Various tests might be proposed and should be duly considered by a congress: none appears to ourselves so reasonable or so likely to satisfy other nations as domicile, in spite of the difficulties which we know environ that much-debated subject.

In theory, indeed, many hold that domicile should fix nationality in *every* adult's case, on the principle well put by Mr. Vernon Harcourt—"the home of a man's choice should also be the country of his allegiance" (Rep. pa. xii.) It is, however, so clear that this rule would not be generally accepted, that we perfectly agree with Mr. Harcourt in practically abandoning it, at least for the present. But it is not certain that there would be the same objection to fix the child's nationality by the actual domicile of the father, at the attainment of majority by the child or the death of the father, while the child was still a minor. Nor does there appear to us any great hardship in laying down that, though an individual may be allowed to change his home, to place himself and his personal belongings under the protection of a new government, without acquiring a new allegiance or forfeiting his old nationality, he shall not transmit this somewhat unreasonable privilege to the children under his control. Adults might fairly be held to have acquired a permanent nationality of origin, with which a subsequent change in their father's domicile should not interfere.

The view here expressed is put forward with a full know-

ledge of the extreme difficulty that will be experienced in defining domicile. Especially will it be necessary to exclude the possibility of domicile being more than single, and to make it depend upon specific acts capable of proof rather than upon vague evidences of intention. But, difficult as the definition would be to frame, if it could be framed so as to satisfy these two conditions, Sir A. Cockburn's general objections (to the introduction of domicile as an element of nationality at all) would seem to be met. We refer to page 204 of "Nationality." Moreover, he is there arguing rather against domicile of the person *de quo agitur*, than the father's, admitting, as he does, consideration of the latter in his "Conclusion" (sec. 2, p. 214).

The fact, however, that any principle appears reasonable to ourselves will not suffice to constitute a good international rule; and, in the rules by which foreign nations at present fix nationality of origin, domicile is not very generally referred to, nor indeed is there perfect unanimity as to the practical application of the favoured principle of descent. Therefore, while we fully admit the justice of Sir George Bramwell and Mr. Bernard's objections to our own old rule, and the merit of Mr. Harcourt's proposal, we cannot but think that to alter our system on this point before a congress has been attempted would be premature.

It is, we know, the fashion to decry congresses and sneer at what are assumed to be their ineffectual efforts. We still believe that in such precautionary deliberations as we now urge lies mankind's main hope of peace and progress, two ideas, perhaps, but which it is at least worth while to try to convert into facts. Nor would the subject-matter of a congress for this purpose lay it open to the objections often brought against such acts as the Declaration of Paris, most beneficial as we believe the latter to have been. That Declaration dealt with rules of war, the application of which, though far, we hope, from impossible, is at any rate rendered more difficult by the excitement of national pride and the

fact of paramount interests being involved. But to settle calmly, by general consent, to which country an individual shall under certain circumstances belong, might often obviate the commencement of that excitement, and remove an excuse or cause of war by giving an acknowledged rule which the most sensitive people could obey without any feeling of humiliation.

There does not appear to us to be so much difficulty in the question of acquired, as in that of original, nationality, and here we, in the main, cordially agree with the conclusions, both of the Commissioners and of the Lord Chief Justice.

The first fundamental recommendation of the Report amounts to the abandonment of our old Common Law doctrine of indelible allegiance, and the recognition of an adult British subject's right to adopt a new country. To deny this right (were we able to do so with success) would be greatly to circumscribe that freedom of action which, as the Commissioners observe, is now recognised to be most conducive to the general good, as well as to individual happiness and prosperity. On the other hand, to permit the exercise of this right in such a manner as might lead to cases of double allegiance would be to perpetuate what has already proved a fruitful source of discord between nations. The commencement of one allegiance should obviously be the termination of the other. As obviously, such commencement should be testified by some overt voluntary act of the individual, which will at once constitute a public record of the transaction, obviate difficult questions of evidence, and prevent the hardship of an individual being surprised into a new allegiance by lapse of time or the involuntary fulfilment of some other condition about which he knows nothing. It is also clearly desirable that the change of nationality should not be considered complete without the formal consent of the country which takes a new citizen under its protection.

All the above points seem to be regarded in the Commissioners' recommendation that "any British subject who, being resident in a foreign country, shall be naturalized therein, and shall undertake, according to its laws, the duty of allegiance to the foreign state as a subject or citizen thereof, shall, upon such naturalization cease to be a British subject." (Rep. sec. 1.)

Another point is omitted, of little or no importance to us, and which we may therefore disregard if we consider the enactment that we are about to make in a merely national light. If, on the other hand, we look forward to the establishment of some uniform international rule, and endeavour to render our present legislation subservient to that much-desired end, we must not forget the great difference between our views and those of most continental nations as to the obligation of personal service due by the citizen to his country. We must remember that in Austria, Prussia, Italy, and probably France (see the Zeiter case and M. Treitt's remarks on it. — Rep. 87, 21), mere naturalization elsewhere leaves the citizen of the new country still liable for unperformed service in the old, and that the claims of the latter to punish and the former to protect may, if they come into conflict, be productive of quite as much mischief as the most complete double allegiance. In the interest, therefore, of the two countries, rather than in that of the defaulting citizen, we believe that it would be better for any old score against the latter to be wiped off on his attaining a new nationality: but, of course, it follows that he cannot be allowed to do this without the sanction of those who may have a right to claim his service. And, though the way would be new to us English, no way seems in our own judgment so well to avoid this particular chance of national differences as that of making the consent of the old country, testified by formal discharge or permission, essential to every voluntary change of nationality. Apart, too, from the question of general utility, if it be desirable,



as we quite agree with Mr. Abbott it is (appendix to Report, pa. 5), that an expatriate should become, from the time of his alien naturalization, absolutely an alien, subject to all the disabilities of alienship, it is no great stretch of generosity to relieve him at the same time from all the burdens of his former citizenship. Of course, it is merely this particular class of political or quasi-political sins of omission, from the responsibility for which we would grant the expatriate a release, the allowance or refusal of such release being left entirely to his old country. We must, moreover, remember that this discharge or permission is now rigorously required by the four great powers mentioned above, who are not very likely to accept a rule dispensing with it. Less, therefore, in the interest of Britain alone than of uniform legislation on this matter, it is submitted that, in relinquishing our claim to indelible allegiance, we might do well to require that a permission should be obtained from some public officer by the British subject wishing to assume a new nationality—a requisition which seems not only unobjectionable in principle, but likely in practice to recommend our rule much better for the imitation of foreign states.

As to nationality of origin, then, it will be seen that we differ from the majority of the Commissioners in preferring the qualification of descent to locality of birth; from the minority, and Sir A. Cockburn, in regarding the domicile of the parent as the best practical foundation for the nationality of the child. As to acquired nationality, we agree with Sir Alexander and the Commissioners generally in thinking the domicile of the person concerned a necessary but not *per se* a sufficient qualification. Theoretically, we entirely approve of Mr. Vernon Harcourt's view that the home of a man's choice should also be the country of his allegiance, but in practice we must, as Mr. Harcourt himself we think would, agree with the Lord Chief Justice that "assuredly nothing short of a public and authentic act,

duly recorded and capable of being proved, ought to have the effect of changing nationality." ("Nationality," p. 203.)

As to the dependent or derived nationalities of wife and children, we have already stated our opinion upon the latter, in treating of nationality of origin; the former should no doubt be determined by that of the husband. (See "Nationality," pp. 211, 212.)

The proposals of Her Majesty's Commissioners, on the one hand, to render more complete the advantages derived from British naturalization, on the other hand, to remove the existing disability of aliens to hold and inherit lands here, seem to us to be both of them wise in principle, though perhaps they may tend to produce rather opposite results in practice. These are points, however, which scarcely come within our present subject, because, being in strictness matters of mere national policy, they do not involve the probability of the rights of different nations coming into conflict so much as the question of double or single nationality, of perpetual or terminable allegiance.

E. C. C.

---

## ART. IX. — RIGHTS OF COLONIAL LEGISLATURES.

I.—*Cases and Opinions on Constitutional Law, and various points of English Jurisprudence, collected and digested from official documents and other sources, with Notes.* By WILLIAM FORSYTH, M.A., Q.C., Standing Counsel to the Secretary of State in Council of India, Author of "The Law relating to Composition with Creditors," &c. &c. London: Stevens & Haynes. 1869.

II.—*On the Competence of Colonial Legislatures to enact Laws in Derogation of Common Liability or Common Right.* By

THOMAS CHISHOLM ANSTEY, Esq., Barrister-at-Law.  
London: William Maxwell & Son. 1869.

WE have placed these books together because the subject treated of in Mr. Anstey's pamphlet is one to which a considerable space is devoted in Mr. Forsyth's volume. In mere bulk the two differ very greatly. The former is a handsome volume of some 550 pages, the latter is a pamphlet of fifty-six pages. Mr. Forsyth has largely and beneficially added to our legal stores. His work may be regarded as in some sense a continuation of "Chalmers's Opinions of Eminent Lawyers," a book to which Mr. Anstey often refers, and which has hitherto kept almost undisputed possession of an interesting but little cultivated field. Chalmers's work made known to the world the legal opinions of such men as Lord Somers, Chief Justice Holt, Lord Hardwicke, Lord Talbot, and Lord Mansfield, on a variety of points of interest and of importance. These opinions were for the most part given when the authors were Law Officers of the Crown. Since the publication of Chalmers, which took place in 1814, though the "opinions" of the Law Officers have been repeatedly given to different departments of the State, yet they have not hitherto been published. Mr. Forsyth, in the interest of the public and the profession, determined to rescue them from oblivion. As he observes, "*Vixere fortes post Agamemnona multi.*" The race of lawyers whose opinions Chalmers has preserved is well represented by those who are quoted by Mr. Forsyth. In this volume are found, for the first time, the official opinions of Lords Lyndhurst, Abinger, Truro, Denman, Cranworth, Campbell, St. Leonards, Romilly, Westbury, Cairns, Chelmsford, Hatherley, Sir William Garrow, Sir Samuel Shepherd, Sir James Marriott, Sir Christopher Robinson, Chief Justice Tindal, Chief Justice Jervis, Mr. Justice Keating, Sir William Follett, Lord Chief Justice Cockburn, Lord Chief Baron Kelly, Sir Frederic Pollock, and others.

Mr. Forsyth speaks of the labour he has had to undergo in collecting the opinions which he has preserved. A mere glance at the contents of the volume will be sufficient to show that this labour must have been very great. In most cases, unfortunately, not in all, the archives of our public offices were thrown open for his use, and thus a body of opinion has been gathered together, which will be invaluable in years to come. For many of the questions to which these opinions relate are concerning subjects which are now very distinctly coming to the front. A large portion of the volume deals with colonial questions, and it is here we may venture to assert that our constitutional law is, or, what is perhaps worse, is believed to be, unsatisfactory. The constitutional relations between England and her colonies are becoming every day of more importance. In Canada, in Australia, and in New Zealand, to say nothing of Cape Colony and the various other possessions of the Crown, nations are rising into existence, which, if their growth is at all to resemble that of the United States, will become, before many years have passed away, as powerful as England herself. Perhaps the greatest question which an English statesman can set himself to solve is, in what way may England take her proper position as the leader of a federation of English speaking nations? For nations and not dependencies, our colonies will certainly be. Meantime, circumstances are continually pointing out that the relations which existed between the mother countries and her colonies in their earliest stage are not such as can be maintained much longer. England has recognised this fact. She has given free institutions and self-government to most of her Australian colonies. She has gone the length of telling the New Zealanders that they must conduct their own war and pay whatever that war costs them. She has assisted the efforts of Canada to establish herself as a dependent nation. She has even gone so far in her determination to allow colonists perfect freedom and not to interfere with their self-government, as to

have created among the colonists themselves the impression that we are willing, and even desirous, to get rid of them. In view of the position which it is probable the colonies will take, it becomes of importance to define clearly what are our legal and constitutional relations with them.

The work of Mr. Forsyth will do more to make these relations perfectly clear than any which has yet appeared. Henceforward it will be the standard work of reference in a variety of questions which are constantly presenting themselves for solution both here and in our colonies. It is obvious, for example, that the question of which Mr. Anstey treats, how far colonial legislatures are competent to enact laws in derogation of common liability, or common right, is one which must, in a variety of forms, constantly be asked. And it is a question of so great an importance, and one so likely to be suggested by the, often, hasty legislation of young communities, that unless the respective rights of the colonies and of the supreme government are clearly defined, we may expect it to occasion continual disputes between them. And here we may remark, in passing, that whenever this particular question is asked, the fullest and most complete answer will be found in Mr. Anstey's pamphlet. Has a colonial legislature the power to deprive a man of the benefit to which, as an Englishman, he is entitled under the *Habeas Corpus* Act? What are the limits to the power of a colonial legislature? How far is such a legislature a counterpart of the English Parliament? All these are questions upon which obscure law is an unmixed evil; and yet they are questions that have had to be considered by various law officers, and on which the law has, with more or less distinctness, been repeatedly stated. It has remained to Mr. Forsyth to collect the law on the subject, and to present it to us as a whole.

It is obvious that as our colonies increase in importance a time will come when they will ask for sovereign powers. Probably their history will for some time continue to be, what

to a considerable extent it has been, a gradual but ceaseless demand for more and more of the elements which compose sovereignty. Mr. Anstey has pointed out that we have given to Canada certain privileges of legislation such as have hitherto not been bestowed on any of our colonies. None of our colonies have ventured, at least during the last 150 years, to claim for themselves power to attain, or to bastardize, or to divorce, or to legitimatize, or in any respect to change for better or for worse the *status* of a single free person, being a natural born subject of the Crown. Mr. Anstey affirms that there exists among them a general incapacity to deal with questions of *status*. To some extent this incapacity has been removed by the "British North American" Act of 1867. Certain colonies of America having outgrown colonial dependence were thus, according to the preamble of this Bill, "federally united into one dominion, under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar to that of the United Kingdom." Certain sovereign powers over *status* have for the first time been conferred upon a subordinate legislature by the Imperial Parliament. But even these powers are exclusively confined to the questions of *status* distinctly enumerated; being concerned with "Indians, questions regarding naturalisation and aliens, and marriage and divorce." The new dominion of Canada however possesses more of the elements of sovereignty than any other of our colonies. She is at once the most populous and the most advanced of our nascent nations. The powers conferred upon her Parliament make it more nearly resemble the Imperial Parliament than any of the legislatures of our Australian colonies. But there can be little doubt that, as Canada increases in population and in importance, she will demand new powers. She will desire to have her Parliament still more analogous to that of the United Kingdom. The Australias, too, will pass through changes similar to those passed through by Canada; and it becomes therefore

of supreme importance that in our legislation we should keep continually before us the fact that these colonies cannot always continue in their present state, and that what may be good legislation for them in the early stages of their progress may be utterly unsuited to their later growth. But, as we have said, no colony possesses so many dismemberments of the sovereign power as the Canadian dominion. The colonies of Australia have powers which are, on the whole, much the same as those possessed by the dominion; but they have received no such delegation of powers over *status*. They are, therefore, incapable of legislating on the subject. Cases are continually occurring which show a desire on the part of colonists, both in Australia and in the West Indies, to possess more power than they at present have. And cases are not unfrequently occurring which show that there is very little exact information as to what are the limits placed by the constitution upon the powers of colonial legislatures. We are thinking now more especially of those colonies which have had "free institutions" bestowed on them. The popular theory on the subject is, that these colonies have a government almost exactly analogous to that of the United Kingdom; that the House of Assembly corresponds exactly with the House of Commons; that its members have the same rights and privileges; its speaker the same powers: that the Legislative Council is a reproduction of the House of Lords, and that the Governor, as representing Her Majesty, has powers conferred upon him corresponding almost exactly with those which the English Constitution has given to the sovereign. The popular theory is no doubt true in the main. For most practical purposes, the Governor, and the Upper and Lower Houses do make laws in the same fashion as Her Majesty and her Lords and Commons. The analogy is maintained in many small matters which, while they help to confirm the popular impression, are, to a visitor in our colonies somewhat ludicrous. The mimic Parliaments sit usually

at the same time as their great exemplar. The Speaker wears a wig of the same cut as his imperial brother. He rules his house in the same fashion. He threatens to "name" a member with as much seriousness, and probably with less consciousness of what will be the consequence of his act. He leaves or enters the chamber with the same results to the legislation going on. He receives the same nod by members entering or leaving the House. He goes through the same formality of shaking hands when the Parliamentary session is over. The forms of the House of Assembly are the same as those of the House of Commons. Down to the minutest particular they are copied by the Colonial Legislature. The very dress of the officials is usually a copy of the English model. The Governor comes down to the House with something of the same state as Her Majesty. A guard of soldiers receives him. The band strikes up on his arrival. He enters the House in that curious and wonderful official coat which Dickens has so admirably described, with the same pomp as a European sovereign. It is true that it is more than probable that half of his auditory are in wide-awake hats, and are looking with something like contempt on the whole performance, but, nevertheless, it has to be gone through. The Governor, as a rule, knows that he is but taking part in an empty show, but he bears his part like a martyr and, greatly to the admiration of the ladies, he reads his speech to the assembled Houses as if he were really a sovereign and not a mere deputy. In this speech the analogy between the Imperial Parliament and the Houses is still kept up. It is published in a "Gazette Extraordinary," and in it the Governor speaks like Her Majesty of "my Government." It would be altogether foreign to our purpose to pursue this analogy further, nor is it in the least our intention to sneer at colonial legislatures. Far too much stress has been laid on the fact that the number of members in our colonial Houses is small. They have been repeatedly spoken of as



Lilliputian, and if the epithet is meant to apply in derogation and in ridicule of the copying by legislatures containing few members of the mere outward shows of the Imperial Government there can be no objection to it. The *questions* which have to be considered in laying the foundations of states are in no sense Lilliputian, and it is with such questions that colonial legislatures are concerned. And there is surely no great disadvantage in mere smallness of numbers. It by no means follows that a Parliament of six hundred members is ten times as wise as a Parliament of sixty. Mr. Bright suggested that if we took the first six hundred and fifty-eight men who passed through Temple Bar, we should have an amount of intellect not much, if any, inferior to that found in the House of Commons. Probably the collective wisdom of a tenth part of that number would not be much inferior. There have been foolish things done in our colonies, but they may be matched with equally foolish things done at home. And surely Houses which contained such men as Mr. Lowe and Mr. Childers could hardly be described as destitute of talent. What, however, we wish to point out is, that with the exact reproduction of the forms of our Government, it cannot be wondered at that the popular impression both here and in the colonies, but especially in the latter, is, that there exists the closest analogy between the functions of the Colonial and of the Imperial Parliaments. As we have already said, the belief is in popular estimation justified by facts. It is not, however, justified by any sound legal opinion. For while it is true that they are local legislatures, with every power reasonably necessary for the proper exercise of their functions and duties, it is also true that they have not what they have erroneously supposed themselves to possess, the same exclusive privileges which the ancient law of England has annexed to the House of Parliament.\* The sovereignty of England resides in

\* *Kielly v. Carson*, 4 Moore, P.C., 63.

the King, Lords, and Commons. The supreme power over the colonies belongs to the same sovereign body so long as they continue to form part of the empire. For purposes of convenience of government, however, and in recognition of what may be loosely described as the right of separate communities to self-government, the Supreme Government has granted certain of its powers to colonial legislatures, and has permitted them to pass laws with the sanction of the king or queen, in a way analogous to that in which imperial laws are passed. But this is widely different from the sovereign body resigning its functions altogether. The sovereign body has entrusted colonial legislatures with certain of its sovereign rights, but it has not parted with them. These transferred rights are clearly defined in the various imperial Acts by which they are transferred. All there granted to the colonial legislatures is granted, but all which is not specifically mentioned as having been granted remains still in the hands of the sovereign body. In other words, the imperial Parliament, together with the king, remains, as it has always been, the supreme governing body in the kingdom. It is a sovereign; the colonies are subordinate governing bodies. A House of Assembly, together with its Upper House and the Crown, may make a valid colonial law so long as they confine themselves to the subjects which are placed within their purview by the sovereign body. But the instant they step beyond this all their acts become null. So far as the Crown is concerned, it is true, that, subject to the special provisions of any Act of Parliament, it stands in the same relation to the colony which has received legislative institutions as it does to the United Kingdom.\* But what we may describe as the complement of powers possessed by the colonies, and necessary to make those powers sovereign, is vested, not in the Crown but in the sovereign body, consist-

\* *Re* Lord Bishop of Natal, 3 Moore, P.C. (N.S.), 148.

ing of the Crown and the two imperial Houses. The local legislature, plus the Crown, may be regarded as forming, if such a contradiction in terms may be tolerated, a subordinate sovereign body; sovereign so long as they keep within the bounds set by the Supreme Government, but subordinate in all beyond these confines, and in that these powers may be resumed and superseded by the true sovereign body. This sovereign body may and constantly does pass Acts affecting the colonies. Acts, for example, affecting *status*, apply to British subjects in the colonies as well as to those at home. Mr. Justice Blackburn, in his charge to the grand jury in *R. v. Eyre*, in 1868, affirmed that although the general rule is that the Legislative Assembly has the sole right of imposing taxes on the colony, yet where the Imperial Parliament chooses to impose taxes, according to the rule of English law it has a right to do so. Of course, in so pronouncing, Mr. Justice Blackburn was speaking as a jurist, concerned with law as it is, rather than as a legislator considering law as it ought to be. But while we should all be ready to agree that taxation without representation is tyranny, yet the remark puts in the very strongest way Mr. Justice Blackburn's opinion of the paramount authority of Parliament. In the navigation laws there were express enactments that the colonists should not make laws to allow foreigners to trade with the colonies. On the one hand Parliament will not allow a colony to pass laws overriding imperial laws, and on the other, it constantly enacts laws which apply to every colony in the empire. A Statute of William IV.,\* enacting that all laws in any of the British possessions in North America repugnant to any Act of Parliament made or thereafter to be made, so far as such Act shall relate to these possessions shall be void, illustrates the first of these statements. Many illustrations might be given of the second. Thus Parliament extended the provisions

\* 3 & 4 Will. IV., c. 59, s. 56.

of the Copyright Act (5 & 6 Vict., c. 45) to every part of the British dominions, and when it was contended in Canada that the words did not include such colonies as had "independent" legislatures, the objection was overruled. In the same way the provisions of the Patent Acts extend to all parts of the empire. The Documentary Evidence Act of last year applies equally to all colonies and possessions, and although it is true that this was made subject to any law that may be from time to time enacted by the legislature of such colony, yet the Act none the less overrules the law existing in the colony at the time of its being enacted. So also by Statute 29 & 30 Vict., c. 65, the Crown has power conferred upon it by Parliament to declare gold coins made at any colonial branch of the royal mint a legal tender within any part of the British dominions.

Perhaps the most marked difference between a colonial House of Assembly and the House of Commons, is found in the fact that the former has no judicial functions whatever. In *Kielley v. Carson* the Court decided that the House of Assembly of Newfoundland had no power to commit for contempt. The rule of the English body furnishes in this respect no legal analogy whatever for the conduct of the other. A colonial legislature cannot take away proprietary rights upon pretext of adjusting them to the measure of rules of State and policy. It cannot abolish the king's courts of justice nor create new courts or offices of justice. It cannot take away or interfere with the freedom of the Bar in relation to their clients and the right of retainer. It has no power to enact the slaughter of runaways, nor in slavery times to attain even a negro slave without giving him a day to render himself, even where charged as a robber. Nor has it power to enact arbitrary imprisonments of any kind.

Even, therefore, in those colonies which have free institutions, the rights reserved are of very great importance. It is no doubt well that this should be so. The precious rights conferred by Acts like the Habeas Corpus Act are not those

which an educated Englishman would like to see placed at the disposal of a few men, to suspend or dispense with whenever their own prejudices or panics prompted them. Nor is it desirable that we should have conflicting laws throughout the empire. Import duties placed upon English manufactured goods are not by any means promoters of friendly feeling between the colonies and the mother country. It is bad enough that we have no Copyright Act between England and the United States, but it would be still worse if any publisher were at liberty to publish an edition of Dickens or Trollope, in Melbourne or Sydney, immediately after its issue in London. The whole empire must, as far as possible, be protected from the monstrous evil of conflicting laws, and until this can be done, as it may ultimately be done, by means of a confederation of states, it is well that the Imperial Government should maintain in its hands that sovereign power which enables it to keep these juvenile planets, with their somewhat rough energy, within the range of their orbits. If the British Empire is either to remain as an empire, or to develop into a federation of free states, a law common to all is absolutely essential. To obtain a perfect law, it is requisite first to know how the law stands at the present time, and Mr. Forsyth has made an invaluable contribution to this knowledge.

It only remains to say that questions of colonial law by no means occupy an exclusive share of the volume. But the amount of evidence collected on the questions of Common, Statute, and Ecclesiastical Law, applicable to the colonies, and of the powers and duties, and civil and criminal liability, of colonial governors, seems to form a fair sample of what has been done on a variety of topics of great interest. Among other questions on which "opinions" are given, and of which careful summaries and generalisations have been added by Mr. Forsyth, are those relating to vice-admiralty jurisdiction, and piracy; the prerogatives of the Crown in relation to treasure trove, land in the

colonies, mines, cession of territory, &c.; the power of courts-martial, extra-territorial jurisdiction, allegiance, the *lex loci* and the *lex fori*, extradition and appeals from the colonies. The volume bears marks of extreme care and regard to accuracy, and is in every respect a most valuable contribution to constitutional law.

---

ART. X.—STATE APPROPRIATION OF RAILWAYS.

*The Appropriation of the Railways by the State. A Popular Statement with a Map.* By ARTHUR JOHN WILLIAMS, Barrister-at-Law. London: Stanford & Son. 1869.

THIS work is a valuable contribution of facts and suggestions on the great subject of the Appropriation of Railways by the State, on which the public mind has advanced and is yet advancing. Those Members of Parliament, public writers, and others, who would master that question, may be recommended to read the opening work of Mr. Galt, then the papers prepared by Mr. Edwin Chadwick for the Association for the Promotion of Social Science, and his papers, and the discussions upon it, at the Society of Arts, also his evidence before the Commissioners of Enquiry on the railway question, and next the report of Sir Rowland Hill, as one of the Commissioners, and the evidence also of Mr. Frederic Hill, given also before the Commissioners, and the report of the Commissioners, and as much of the evidence as they may choose for their satisfaction. This work of Mr. Arthur Williams may be commended as following up the statements of the experienced public administrators referred to, with statistical information, put together in a convenient form, and some good popular

arguments on supplementary points. On the question whether after the railways have been acquired by the State they should be let out on lease, to be worked for the profit of the lessees, we agree with him that they ought not. On this and on other points he appears, nevertheless, not to have seized sufficiently sharply and clearly the principles laid down by the leading authorities on the popular side of the question, as those by Mr. Chadwick, that railways ought to be worked, not for any profit, but for the cost of the services;—that all taxes in intercommunication are of the worst of taxes, and that railways, like common roads, often pay well to landowners, and to the public, though they fail even to pay the expenses of maintenance by tolls or rates. Neither has the force of the argument of the latter gentleman, of the importance to the public of the union of the railway service with the postal service, with its twelve thousand post offices, as collecting houses and distributing houses, with the machinery of the post carts, and the services of twenty thousand officers, been duly appreciated and placed sufficiently prominent by the author. On the question of railway fares and charges, he appears (p. 116) to accept the position of the companies, that because the English works have been made to cost more than those of other countries, higher rates ought therefore to be imposed upon the public for them—a position which, even as a position for a purely commercial administration, was completely overthrown by Mr. Galt, who showed that the cost of a railway, whether it was a penny or a hundred thousand pounds a mile, had nothing administratively or commercially to do with the question, and that all even the commercial administrators had to learn on trial, and consider, was what fares or rates, whether high or low, paid the best. Experience is advancing in proof of the fact that low rates are the most productive.

The chief principles of legislation and administration, first most fully and completely promulgated on the subject of

railway reform from the chair of the Department of Economy and Trade of the Association for the Promotion of Social Science, have now been fully recognised and adopted by the Legislature in relation to the purchase of the private companies for telegraphic communication and the application of that method of communication to the public postal service.

The astute Mr. Bouverie, the member for Kilmarnock, and chairman of companies, with the other representatives of directorates, based their opposition to the electric telegraph measure on the ground of the precedent it would set for the purchase of the railways by the State. And they were in that anticipation correct. It has established that great precedent.

The first principle contended for in respect to railways, was that the establishment and direction of the means of communication for the public was a primary duty of the State.

In the next place it was contended, that by unity of management and by State security for the capital expended in works, an important saving might be made, as the State might hold for  $3\frac{1}{2}$  per cent. money which could only be had by private companies at  $4\frac{1}{2}$  or 5 per cent. :—that this saving might be divided between the shareholders and the public; that to the shareholders might be given better returns and the augmented value of security for their capital, and to the public, lower rates for better and more responsible service, the saving of time by better fitting means of communication, and the saving of the labour of verification from conflicting charges. These are the principles that have been approved. It may be that, on some points, the share of the profits from the saving from unity given to the telegraph companies has been too large, but we believe that, with the exception of some of the railway companies, it has been fairly within what was contended for, i.e., the recognised principles of compensation, and a bonus for



compulsory purchase. But the investigations requisite for the purchase of the companies' stock and good will were fraught with instruction, as to the common management of the trading Directorates. In the first place, it displayed the losses at which they were conducting competing lines, and that greater gains than they were aware of might be derived from unity of management; gains so great that they became quite indifferent as to the Government terms of twenty years' purchase, and were prepared to amalgamate themselves had the Government measure not passed. It was made clear, that while the directors of the International Telegraph Company were accounting to their shareholders for net profits of 10 per cent., their real and increasing earnings were 14 per cent., expended in extensions, reserves, &c.

The success of the postal telegraph measure may be confidently anticipated, though its extent may be reduced and its brilliance may be dimmed by the principle, yet maintained by the Post Office, that intercommunication may be conducted not solely for expense of the service, as it ought to be, but for the sake of revenue, which it ought not to be.

The appropriation of the railways of Ireland by the State comes, as a duty, within clear principles of legislation thus decided, and it is an early duty already prepared and provided for at the hands of Mr. Gladstone's government. Economists are clearly of opinion that the appropriation of the Irish Church endowments to the objects proposed—the maintenance of lunatics—was a mistake as an economical measure; and that it could only be regarded as a political measure—as a bribe, in fact—to the Irish landowners for their support in Parliament, for there can be no doubt that the appropriation will be a relief from their proper charges, and will soon go into their pockets. The disestablishment of the railway directorates of Ireland will, it may be contended, conduce

far more to the material prosperity and relief of Ireland than will the disestablishment of the Protestant hierarchy of Ireland. No one can doubt this who will see, as Mr. Galt first saw, the benefits conferred upon the poor farming districts of Belgium, as well as of other countries, by cheap railway intercommunication. It would rid the small farmer of Ireland of the charges, and delays, and the vexation of middle-men, for the sale of his produce, as well as for the purchase of the produce consumed by him. It would enable him to send his butter to the town consumer direct, without delay, and fresh to the town consumer at a rate of a shilling per hundredweight, delivered a hundred miles; and so with his potatoes. The Irish Railway Commissioners' examination of the effects of cheap rates, upon the distribution of the produce of small farms, and upon retail trade generally, in the poorer districts of Belgium, analogous to those of Ireland, has been very unsatisfactory. We agree with Mr. Arthur Williams that their estimates of the direct gains derivable from consolidation have been greatly overcautious. The estimate of the gain from unity of management of 130,000*l.* per annum, made by the late Mr. Dargan, or that of Mr. Forbes, for ten years traffic manager of the Midland Great Western, of 120,000*l.*, may be maintained as far more trustworthy than the Commissioners' estimate of 88,000*l.* per annum. Mr. Bidder has testified that in Ireland, under unity of management, two goods trucks may be made to do the work of three. In fact, we have not got to the bottom; certainly the Commissioners have not found, if they have sought the bottom of the gains practicable, on the existing system.

The *Times* is now putting forth articles to show how greatly the cost of the transit of goods and the wear and tear of the rails may be reduced. But of what avail is that writing to the present administration of the railways, through engineers, and managers, and directors,

who are notoriously interested in expense—who come out with large fortunes from concerns where the shareholders come out only with low dividends!

Credit in railway enterprise and extension is now dead. It has been killed by the directorates and by the great railway smashes, which, since the sitting of the English Railway Commission, have taken place in verification of the denunciations that the system was rotten at the core, to which the railway directors on that Commission, most improperly appointed as judges, turned a deaf ear. On the continent public opinion goes wholly against private company management, and against the means of communication being made a source of profit of financiers and the jobbers of the Bourses. Prussia, Belgium, and the well-administered continental states, are improving their administration, lowering their tariffs, extending their conveniences and means of transit, and gaining upon us in the neutral market; whilst our system, under the weight of upwards of a hundred directors, of purchased seats in Parliament, remains stagnant and stationary. For Ireland, as a beginning, the disestablishment of the railway directorates, the development of the means of the transit of its produce, the freedom of the movement of its people, and the development of its resources, as in the programme set forth at the meeting of the Association for the Promotion of Social Science at Belfast, is now, impartially considered, a foremost question of even greater importance than the land tenure question.

We do not deny the importance of that measure in itself. But it will be a great economical error if predial and political passion in Ireland be allowed to occupy attention with it, to the exclusion or to the postponement of the railway question. The evils of the land tenures in Ireland, though extensive, are confessedly partial in their operation, and will be slow in their cure. Where the ownership of the land is the real desire of the occupier, even Mr. Bright admits that it must be obtained by purchase, and what is the order of

intelligence that, for every acre of land in that cold and wet climate, will give as much as would purchase twenty or thirty acres of fertile land in the radiant realms of the new world, with greater pastures? What is to be said for the sense of one who, having capital, gives it for a return of only 3 per cent. as an owner, instead of using it under a lease, for the purchase of manure, and getting 10 per cent. or more by working the land as an occupier and improving cultivator? And for the purchase of manure and the sale of produce, what measure is so immediately and directly important for all cultivators, under every form of tenure, as cheaper and quicker transit? What is to be said of the economical knowledge of members of Parliament who are ignorant of this, or who, if they are not ignorant of it, urge the postponement of the greater for the sake of the lesser measure? It will be a misfortune if the mind of our Prime Minister should be preoccupied or diverted against progress, in this, the direction of his own wide and wise forecast, or should be obstructed by the known contracted principles in favour of the trading companies avowed by his Chancellor of the Exchequer, and by his objections against pecuniary risk from the undertaking, which has been met by a wise determination of the landowners of Ireland to meet any such risk by undertaking to bear an extra tax for it.

In England, the sources of public opinion are extensively corrupted by the railway system against its amendment. The chief journals have an interest in the system from the large amount of profit they derive from the advertisements arising out of it. The seats of commercial opinion, the chambers of commerce, especially in the northern districts, are extensively occupied by railway directors and railway jobbers. Hence, suppressions and false manifestations of public opinion. The shareholders are too numerous to meet or to inform themselves independently of the state of the management of their affairs, or the need of a thorough reformation; and hence the need of independent and out-

spoken declarations upon them. For the relief of the present manufacturing distress, and the depression of commerce, no measure will be so potent as one, which by obtaining uniformity of management under public control, shall reduce the charges for the transit of commodities and persons by railways. All who had thought upon the subject of the electric telegraph foresaw that unity of management, under a public authority, was a necessity, and that all delay to take it up was in augmentation of the public expense for the purchase of it. All delay to take the inevitable measure for unity of railway management will likewise be in augmentation of the public expense, occasioned by the incapacity, the default, of the Legislature.

---

## RECENT DECISIONS IN SCOTCH COURT OF SESSION ON GENERAL POINTS OF LAW.

20 Feb., 1868.—*Youle v. Cochrane, &c.*—40 *Jurist*, 222.—  
(First Division).

### SHIP—FREIGHT—LIEN.

A VESSEL was chartered for two years. The charterer gave the use of the ship to convey a cargo from one port to another at a stipulated rate, one-third to be, and was, paid the charterer before sailing, the remainder to be paid at the port of delivery. On the bill of lading signed by the master there was a receipt for the third paid to the charterer. The consignees in a foreign port, in ignorance it was said, of the previous payment, paid the whole freight to the master; but which was less than the amount of freight due by the charterer to the owners under the charter party. The shippers brought an action against the owner for repetition of the one-third paid by the consignees to the master. The owners were assolized, it being held they had a lien over the cargo for the whole freight, which was not affected by the arrangement between the charterer and the shipper. Per Lord President (Inglist).—"The captain had a lien as representing both the owners and the charterers. All that is plain, and if the ordinary course had been followed here the present question could never have arisen. The ordinary course, when the charterer wishes to load the goods of another shipper, is to frame ordinary contracts, by bills of lading, between the master and the shipper, but there is interjected here a document called a '*sub-charter party*,' a name I never heard of before. It is not a charter party, for that can only be made between the owners, or the captain as representing them, and the charterer; but this is between the charterer and somebody else. It is a kind of sub-lease, but as the charterer is not in the position of a lessee he cannot convey to sub-lessee. In short, it is just an innominate agreement by which, for a certain voyage, the pursuers were to have the exclusive use of the vessel; but that is not binding on the owners or master, for neither of them are parties to it. The right of the master, as representing the owners, was to hold the goods and refuse delivery until the freight due was paid."

5 & 21 Feb., 1868.—*McLeod v. Leslie*.—40 *Jurist*, 229.—  
(Second Division).

### MARRIAGE CONTRACT.

*Held* by a majority of seven judges (diss. Lord Deas.) 1st. A father, having by marriage contract settled his estate on his heir male, secured a provision of 16,000*l.* to each of the younger children.

He died leaving only 15,000*l.* of free executory. Several of the writings were contained in a sealed packet, and, by the instructions of the deceased, placed in his coffin. The coffin was opened by order of the Court and the documents recovered. The son, as heir of provision, was held bound to implement the obligation in favour of the younger children. 2nd. The heir having granted a bond to one of his sisters for 5,000*l.*, she discharging all claims against her father's estate. *Held*, her representative could not demand payment unless on relieving the heir of the provision in her favour. Per Lord Justice Clerk (Patton).—"The defender became heir of provision by reason of an onerous obligation in a marriage contract. It is a burden to be borne by heirs of provision, and one who takes upon him that character cannot evade the legal burden which such heirs must bear." Per Lord Deas, *contra*.—"The provision to the eldest son is just as onerous as the provision to the younger children, and he is a creditor of the father just as they are creditors. It is settled that they are not entitled to compete with onerous creditors, but there is no doubt whatever that, in a question *inter familiam*, they are to be considered as creditors and entitled to that position."

21 Feb., 1868.—*Hamillen v. Rattray*.—40 *Jurist*, 245.—(Second Division).

#### LEGACY—VESTING.

Under a settlement several legacies were left payable at the first term after the death of the wife if she survived the testator. She survived—some of the legatees survived the testator and the widow; others died after the death of the former but before the death of the latter. The trustees paid the legatees who survived the widow. This was an action to have it found that the others had lapsed by pre-decease. The Lord Ordinary (Kinloch) held these legacies had lapsed. The Inner House reversed. Per Lord Justice Clerk (Patton) "Time is annexed to the payment of the legacy and not to the legacy itself. The legatee is to be paid at a time certain to arrive though that time may be distant, but the gift is made to the party and is not so connected with the time in the expression of the gift as to make the survivance an absolute condition of taking it. The payment is merely postponed."

21 Feb., 1868.—*Cameron v. Menzies*—40 *Jurist*, 249.—(Second Division).

#### ARBITRATION—REDUCTION OF AWARD.

An award was sought to be set aside. Two issues were sent to a jury. 1st. Whether the arbitrator acted corruptly. 2nd. Whether the award was given without hearing parties. The jury found for the pursuer in the reduction on both points. The Court on a motion for a new trial, on the ground of the verdict being contrary to evidence, granted a new trial on the first issue, but sustained the verdict on the second. Per Lord Neaves—"It is not easy to define corruption. It is

not necessary that the arbiter should be bribed, nor is it necessary there should be some other form of venality, or gross immorality, or flagitious action in the conduct of the arbitration. Corruption may take a milder form. But there must be some pravity of mind, some perversion of the moral feeling either by interest or passion, or partiality between the two parties, some unfairness which disturbs the balance which the judge should keep in his mind. Corruption does not consist in intellectual error, or in defective ratiocination; the vice must be in the feeling, as it is there that the virtue or vice of fairness or unfairness lies. If conduct belongs to that category a very little corruption may upset an award, but still something must exist in the judge's mind which prevents his acting as a just judge. In the present case I find no evidence of partiality or corruption on the part of the arbiter. It is not enough to say that he had a partiality for some opinions. Every judge probably has some favourite opinion or theory, and arbiters have also the same, and indeed an arbiter may be selected on account of his known opinions." "I observe that the arbiter was examined before the jury. This seems to me to be a very doubtful proceeding. I think it highly inexpedient that a judge should be liable to be examined on all the motives which influenced him in pronouncing judgment." Lord Justice Clerk (Patton) dissented as to the first issue.—"I think the jury were entitled to deduce from the facts such a culpable failure of duty and injustice as to amount to corruption. I do not think it is necessary that there should be moral depravity. It is enough that there has been misconduct, even when that proceeds in error, provided the acts of the arbiter have operated unfairly on either of the parties."

26 Feb., 1868.—*The Lord Advocate v. Hebden*—40 *Jurist*, 254.—(*First Division*).

PROPERTY—WRECK—REGALIA.

The Advocate sued a declarator to have it found that the Crown had the right to all wrecks cast on the shores of Eday, in Orkney. The defender pled as the proprietor of the island, titles from the Crown, giving amongst other things, "*wrak*," followed by forty years' possession. It was contended for the Crown that "*wrak*" meant sea ware, and not wrecks cast on the shore, and that subsequent possession proved this to be the meaning. After a long proof the Lord Ordinary (Mure) and the Court decided for the defender. Per Lord Ardmillan—"By our law the right to wrecked property is in the Crown. It is *inter Regalia minora*. It is not of that class of *Regalia* inseparable from the royal dignity, but of that class which may be communicated by grant of the Crown to a subject. All evidence of possession must be according to the nature of the right, and the circumstances of the case. Opportunity of exercising the right is occasional, and not on every occasion worth exercising. But I must say that I could scarcely have expected better evidence of the assertion of right and the exercise of right than what the defender has adduced. It is imperative to bear in



mind that no right is claimed by the proprietor which encroaches on the rights of the lawful owners of wrecked goods.—Rights which are ignored by our ancient law, but which the more just and humane legislation of recent times has carefully protected.”

3 March, 1868.—*Benn & Co., v. Porret & Sealy*.—40 *Jurist*, 278.—(*Second Division*).

#### CHARTER-PARTY.

A chartered a vessel to B, of which C was master. The ship was to proceed to a foreign port with a cargo for the owner's benefit. The ship was to be consigned to the charterer's agents at the foreign port; the freight to be paid by what cash was necessary to be advanced, not exceeding a certain specified sum, by the charterer's agents at the foreign port, and the remainder at the home port of discharge. D, the charterer's agent at the foreign port, declined to make the advances until the master C granted him an acknowledgment and obligation for reimbursement out of the freight at the home port. The ship was sub-chartered by B to take a cargo home. A, the owner, received the freight, D prosecuted B the owner and C the master for the advance, under the obligation of C. A defended, and pled that the advance must be imputed to the freight, payable to him by B, of which a balance remained due after imputing the advance and the home freight. The Sheriff Substitute (Greenock) and Sheriff of Renfrewshire held that the advances were made according to the charter party, on the credit of the charterers, and as part of the stipulated freight, and the master had no power to convert the advances into a loan on security of the freight. The Court (Lord Cowan dissenting) held that the obligation granted by the master was within his power, and bound the owner and himself. The Sheriff's judgment was reversed, and decree given. Several English authorities were cited in the discussion.

13 March, 1868.—*Jamieson v. Waterhouse and others*.—40 *Jurist*, 306. (*The whole Court*.)

#### PARTNERSHIP, LIMITED.

Certain parties leased a mineral field, but being unable to carry on the enterprise they projected a Limited Liability Company, under the name of the Garbel Hæmatite Company. The articles set forth that the nominal capital was 105,000*l.*, divided into 1000 shares of 105*l.* each, whereof 100,000*l.* was paid up (but which was wholly false), and 5000*l.* remained to be called up in sums not exceeding 100*l.* at each time. After a time the lessors applied for the winding up the concern under the Statute, and the petitioner was appointed liquidator. He realised the whole property at 111*l.*, and the debts he estimated at 16,900*l.*, to meet which he made a call of 30*l.* on each share. He applied to the Court to have a list of contributories made up and the call authorized. Three parties who had purchased from

the original projectors objected to their names being included in the lists in respect of the fraud in the constitution of the concern to which they were not cognizant, and that the creditors had full knowledge of the published basis of the concern. The Court (First Division) ordered a hearing before the whole judges on certain queries : 1st. Whether the petition should be at once refused ; or, 2nd. Whether the liquidator should be allowed to establish the grounds on which he contended the names of the respondents should be included in the list ; and 3rd. Whether the Court should direct an enquiry into the origin and history of the concern. Of the consulted judges, Lord Justice Clerk, (Patton) and Lords Cowan, Neaves, and Mure were of opinion that the questions should be answered in the affirmative. Lords Benholme, Jerviswoode, and Ormidale gave negative answers. In consequence of this diversity of opinion the case was ordered to be again argued before Lord Kinloch, who coincided with the opinions of Lord Justice Clerk and the majority. When the cause came to be advized before the judges of the First Division, Lord President (Inglis) and Lord Curriehill were for rejecting the application, whilst Lords Deas and Ardmillan were for sustaining the same, therefore by a majority the Court sustained the application, and found the liquidator entitled to a proof of the averments made by him on record. The majority held that the liquidator represented the creditors of the Company. English decisions were referred to on both sides.

13 March, 1868.—*Christie v. Hutchison*.—40 *Jurist*, 326.—*(First Division)*.

GUARANTEE—BILL.

A guarantee was given "to the extent of 1500*l.* for sugar sold and to be sold." The invoices set forth "terms cash in fourteen days, less 2½ per cent. discount." The sellers took bills at three months. Held, 1st. That the taking of bills was not giving time, as the term of fourteen days was only to regulate the discount. 2nd. That the guarantee covered furnishings of treacle and syrup. 3rd. That an indefinite payment might be applied to open accounts. The Lord Ordinary (Kinloch) decided some of these points for the defender, but the Court reversed. Per Lord President (Inglis)—"We are bound in the absence of evidence to hold that the term 'sugar' means and was understood to mean treacle and syrup as well as sugar, *i.e.*, all the things in which the parties dealt. The forms of the invoices do not affect the matter or preclude the pursuers from giving any reasonable extent of credit to their customers. The credit they give is three months, and that is neither unusual or unreasonable. By taking the bills they did nothing out of the ordinary course of trade, and nothing but what was contemplated by the guarantee." In the accounting a distinction was taken between an I.O.U. not holograph, being the foundation of an action or merely a voucher of an item in an account. Lords Deas and Ardmillan were of opinion that such could not be the foundation of an action.

18 March, 1868.—*Campbell v. the Earl of Bredalbane*.—40 *Jurist*, 329.—(*First Division*).

#### FOREIGN COURT.

A party in a suit in Chancery for perpetuating testimony, obtained an order for the examination of witnesses in Scotland, and now applied for an order on certain parties to search for and exhibit writings. The order was refused. Lord Deas dissented on the ground that the law and practice of England on such matters should be first ascertained. (Affirmed on appeal by the House of Lords.)

18 March, 1868.—*Fairbairn v. Fairbairn*.—40 *Jurist*, 332.—(*Second Division*).

#### PROOF—PRESUMPTION.

A party sued the representative of his brother for advances contained in receipts in name of the deceased debtor, but which receipts were in the pursuer's possession. A proof by parole was allowed the pursuer as to who made the payments so vouched. Per Lord Benholme—"If these receipts had been found in the possession of the debtor, a presumption would have arisen which could not have been rebutted by parole evidence. The circumstance, however, that they are in the pursuer's hands is the prominent point in the case, and tells strongly in favour of the pursuer."

20 March, 1868.—*Western Bank and its Liquidators*.—40 *Jurist*, 336.—(*Third Division*).

#### FOREIGN COURT.

An application for an order on a sheriff's clerk to deliver up the original of a recorded deed, to be transmitted to the United States on an affidavit that an office copy was not admissible evidence in that country, *refused*. Per Lord President (Ingليس)—"If the affidavit means that the terms of a deed cannot be proved in any way when it is impossible to produce the original, then all I shall say is that I do not believe that to be the law of New York, or of any civilised country."

25 March, 1868.—*Wink v. Spiers*.—40 *Jurist*, 340.—(*Second Division*).

#### LOAN—PROOF.

A jotting in pencil in a memorandum-book, made by the defender, of a sum received from his brother, now deceased; *held* not sufficient evidence of a loan. Per Lord Neaves—"It is not sufficient, that the pursuer shows from a document, never seen by, or delivered to, the creditor, the fact that a sum was at one time, many years ago, paid by the deceased to the defender. There must be a regularity and authenticity in the record kept in order to raise a presumption of something more than the fact of the original payment."

16 March, 1868.—*Bathgate and Airdrie Road Trustees v. Earl of Buchan*.—40 *Jurist*, 357.—(First Division).

HIGHWAY—PROPERTY.

Road trustees acquiring ground under an Act which gave them "right to take and use the ground, as fully and effectually as if they had received regular dispositions of the same," and thereupon infestment had followed, and with "power to dispose of and sell" the same. *Held* the trustees had no right to the *solum* or the minerals under the same, therefore they could not interdict the tenants of the minerals from excavating underneath, though this had occasioned damage by subsidence, but might prevent the working in such way as occasioned injury to the road. Per Lord President (Ingليس)—"I think that the right to take and use ground for special and limited purposes cannot be construed as an absolute right of property. The purposes for which this ground was to be used were the making and maintaining of a road, and the only rights conferred by the Act are in furtherance of these purposes."

13 May, 1868.—*Reid v. Keith*.—40 *Jurist*, 393.—(Second Division).

LANDLORD AND TENANT.—INVERSION OF POSSESSION.

*Held* (Lord Jerviswoode dissenting) that the use as an auction-room of a shop let for retail business is an inversion of possession which the landlord could prevent. Per Lord Justice Clerk (Paton) "The case of an auction of stock, belonging to the tenant, at the termination of a lease or on a tenant's bankruptcy is a different matter. The disposal of the stock is then incident to the possession. The sale by auction here relates not to stock in possession of the tenant of the shop, but imported for the express purpose of being so sold."

19 May, 1868.—*Charles v. Smith*.—40 *Jurist*, 397.—(First Division).

JURISDICTION—FOREIGN.

An action by a widow of a domiciled Scotchman to reduce a discharge she had granted. The trustees and executors, being resident in England, objected to the jurisdiction. Defence repelled and action sustained in respect that the defenders as trustees stood vested in the heritage left by the deceased.

28 May, 1868.—*Tennants v. Tennants, Trustees*.—40 *Jurist*, 408.—(First Division).

REDUCTION—FRAUD.

This was a special case of a reduction of a family deed of agreement on the grounds of undue influence and false and fraudulent

misrepresentations. The Court (Lord Ardmillan dissenting) assailed. —The case involves a very large sum, and the decision is under appeal to the House of Lords.

27 May, 1868.—*North British Oil Company v. Swan*.—40 *Jurist*, 414.

#### AGREEMENT—CONSTRUCTION.

By an agreement A agreed to take from B as much oil coal as he required, not less nor more than a weekly specified quantity, and B agreed not to supply any other person with similar coal at less price than charged to A. A brought an action to have B bound to supply the specified quantities, and which he was entitled to sell, use and dispose of as he pleased. *Held* (Lord Curriehill dissenting) that B was only bound to supply A with what coal was necessary for the manufacture. Per Lord Ardmillan—"The pursuers contend that the word '*require*' is here synonymous with '*demand*.' I am of opinion that the agreement cannot bear that construction. It can hardly be maintained that under this agreement the pursuers could stop their works altogether, and yet continue to exact from the defendant the weekly supply in order that they might export it, or otherwise sell it, in an unmanufactured state. On such a supposition, the pursuers, instead of trading with the defendant as customers increasing the demand for the article which he sells, would really enter the market as mere competitors." Per Lord Curriehill *contra*—"I am of opinion that by his contract the defendant became bound to supply the pursuers weekly with a certain quantity of oil coal, which on being delivered was to become the property of the pursuers; and I am unable to see upon what grounds they can be prohibited from selling what is their own property, or dealing with it in any manner they please. There is a large quantity of this coal lying stored up at their works, just now, and if these works would come to a stop to-morrow, whether by some fluctuation in the demand for the oil which they manufacture, or by any other accident, they would not be able to dispose of it at all if the defender's construction of the agreement were correct."

July, 1868.—*Milne v. Souter*.—40 *Jurist*, 558.—(*First Division*).

#### OBLIGATION—RAILWAY STOCK.

A bound himself with others that, in the event of B obtaining an allotment of 400 shares of 10% each in a railway, they would guarantee him from loss if he were not able to dispose of them within two years of the opening of the line, at or above par. B obtained the shares and paid the deposits and calls, and twenty shares were allotted to A, being equivalent to the sum attached to his subscription to the guarantee. In an action for the loss on the twenty shares, the plea was set up that the guarantee did not connect the

defender with any particular shares, but only with certain money advances. Defence repelled.

3 July, 1868.—*Mackintosh v. Square*.—40 *Jurist*, 561.—(Second Division).

SLANDER—ASSAULT.

*Held*, 1st. That violent gesticulations made use of by a person under provocation and *in rixa* do not amount to assault. 2nd. That general epithets, such as “scoundrel” and “blackguard,” without specific charge against character, and spoken under the same circumstances, are not actionable as slander. 3rd. That it was material that no apology was asked, and no notice of the action, and that an apology was tendered in defence.

9 July, 1868.—*Beaumont and Others v. The Great North of Scotland Railway Company*.—40 *Jurist*, 580.—(First Division).

RAILWAY.

A question with respect to the ranking of certain classes of preference stock.—*Held* that a resolution of railway directors in lieu of cash payments of dividends to issue allotments of capital stock then unissued was *ultra vires*. Per Lord Deas—“Apart altogether from the authority of decisions it comes to this, that the dividends would be paid with the capital and not with the profits of the company. If the company were first to sell the shares and then give the price to the shareholders, that would be giving the capital, and what has been done comes precisely to the same result. Each shareholder who received an allotment of that stock would receive a portion of the capital of the company, which ought to be left to yield dividend.”

18 July, 1868.—*Connel and Company v. Daunt and Company's Inspectors*.—40 *Jurist*, 624.—(Second Division).

BANKRUPTCY—IRON WARRANTS.

In a competition for the value of iron deposited in a warehouse in Glasgow. *Held*, 1st. Indorsement of iron warrants transferred the property. 2nd. The effects of indorsation in England must be judged according to the law of Scotland; and 3rd. On the opinion of English counsel the indorsee held preferable to inspectors of bankruptcies appointed after the date of indorsation, but before intimation to the warehouse keeper.

30 May, 1868.—*Highland Railway Company v. Mitchell*.—40 *Jurist*, 499.—(Second Division).

FOREIGN WITNESS.

In an arbitration a petition was presented to the Court, craving warrant to cite a witness, resident in London, to appear before the

arbiter at Edinburgh. The Court refused the application. The Court held that the Act 17 & 18 Vict., c. 34, applied only to actions in the Court of Sessions, and that the remedy was to apply for a commission to examine the witness in England, to which the Court would interpose its authority under 6 & 7 Vict., c. 82, s. 5.

2 June, 1868.—*Mackenzie v. Viscount Hill*.—40 *Jurist*, 499.—(Second Division).

#### ARBITRATION.

*Held* that it was not a ground for reducing an award of the value of sheep stock that parties were not heard where the arbiter was a man of skill, and made a sufficient inspection. Per Lord Benholme—"I look upon the presence of the element of *wrong* as indispensable to the success of every reduction of this kind, for while we are not to allow arbiters to run riot and pronounce wild judgments, we are not lightly to interfere with their decrees. We must be able to put our finger on some *wrong* before we can upset a decret-arbitral."

5 June, 1868.—*Glasgow Life Assurance Co. v. Stiven*.—40 *Jurist*, 504.—(Second Division).

#### FOREIGN JUDGMENT.

In a multiplepinding (interpleader) the fund was the sum in a life policy. It was claimed by a creditor who held a decree of the English Court of Exchequer against the person insured, and who, after his death, obtained himself decerned executor *qua* creditor by the Commissary of Edinburgh. This claim was opposed by another claimant founded on an assignation made in his favour by the debtor, but not intimated to the office until after the confirmation by the other claimant. *Held*, 1st. That the decree of the English Court was a good title whereon to obtain confirmation. 2nd. That the proof of authenticity of the decree of the English Court was sufficient if the same was held good in England. The evidence of the English decree was an office copy without subscription by any official, but bearing an office stamp. The opinion of English counsel was taken, who held that the document was only good evidence in the Court whence it issued, but might be supported by proof of comparison with the original. The Court allowed proof in support of the authenticity of the decree, and on this being admitted the title was sustained.

12 June, 1868.—*Robertson v. Taylor*.—40 *Jurist*, 526.—(First Division).

#### DONATION—PROOF.

A few days before death, a person directed a sum of 3600*l.* to be drawn from bank, and to be re-deposited in name of his wife. This was claimed as a donation *mortis causa*. The children disputed this, alleging that the act was to save legacy-duty, as the

wife was one of the husband's trustees under his settlements. The Court allowed a proof by parole, and thereon sustained the donation. A sum of 2000*l.* was left with the deceased (William) by his brother (John) to be divided amongst William's children. The trustees of John divided according to a holograph, but unsubscribed jotting, of John. The Court allowed parole proof in support of the jotting, and thereon sustained the division made by the trustees according to the jotting. Per Lord President (Inglis)—“When this money was delivered the trustee was on his deathbed. His case was not that of a person in middle age suffering under acute disease, from which there is a chance of recovery, but was an old man dying in the ordinary course of nature, where speedy death might be regarded as inevitable. It is plain therefore that the gift was made *intuitu mortis*. If it was a donation *mortis causa*, there can be no question as to the competency of parole evidence. I think, that by delivery of the money and lodging it in a bank on a deposit receipt in his wife's name, the deceased intended to transfer, and actually did transfer, to her an immediate right to the 3600*l.*, and I entertain no doubt, that if by any chance his life had been prolonged, and he had recovered from the condition in which he then was, the gift would not have received, and was not meant to receive effect.” As to the second question, “Had the jotting stood alone, I should not have held it sufficient for the purpose of authorizing the division, for it is an informal and irregular writing, and might have been made for a different object, but the evidence removes all reasonable doubt upon that score.”

12 June, 1868.—*Russel v. Gillespie*.—40 *Jurist*, 529.—(*First Division*).

MINERALS—BOUNDARY.

A mineral lease prohibited the tenant from working nearer the Mansion House than 100 yards. *Held* that the measurement was from the exterior walls as seen above the ground, as contended for the tenant, and not from the outside the foundations under ground.

19 June, 1868.—*MacKenzie v. Bankes*.—40 *Jurist*, 535.—(*First Division*).

ROAD.

On a proof it appeared that a road had been used far beyond the prescriptive period as a horse and foot road, and on certain portions as a cart road, but could not be used in this last way from end to end because of natural obstructions. *Held* the road was public for foot and horse but not for carts or carriages. Per Lord President (Inglis)—“I can understand that if a public road had been used for all the purposes for which it was useful to the public from time immemorial for the passage of goods and passengers in every way in which they were in use to pass, then on the introduction of carts the right of the public would undoubtedly be a right to use the road for carts. But this must be subject to the qualification that the road is capable of being used for that purpose. It will



not do merely to say that the public have had carts on the road, and that the carts have gone up or down a little way and returned. This is not the use of a public road. A public road is a road between one public place and another, and therefore that is not the use by carts of a public road. But the important point is that this road cannot in fact be traversed by carts from one end to the other. In short, it is not a road which is capable without engineering operations of being made a cart road. In these circumstances we would not be justified in holding that the public have a right to use it as a cart road, for the result would be that if the authorities took in hand to maintain this road for the public benefit they would proceed to make the road a cart road, and that would be a process of conversion from the physical state of the road in which the public have used it, into a different state altogether."

19 June, 1868.—*Mackenzie v. Drummond*.—40 *Jurist*, 537.—*(First Division)*.

#### FOREIGN.

A verdict for 300*l.* of damages was returned by a jury. Before the verdict was applied by the Court the defender died. The pursuer brought an action against the executors to have the former action transferred against them. The deceased was domiciled in England and had no heritable estate in Scotland. She executed a will in the English form, which was proved in the Probate Court. The two executors resided in England, but one of them had an estate in Scotland. The Court refused to sustain their jurisdiction and transfer the action. Per Lord Deas—"In an action of transference there must be jurisdiction over the representatives founded in the same way as against an original party. What the result may be, and whether there may be a good action against the representatives in England founded on the verdict, I do not know."

19 June, 1868.—*Campbell v. The Clydesdale Banking Company*.—40 *Jurist*, 539.—*(Second Division)*.

#### REAL BURDEN—ACQUIESCENCE.

An estate was leased out under certain regulations as to the style of building "for the utility and ornament of the street." The superior sought an interdict (injunction) against the defenders departing from the stipulations. The Lord Ordinary (Jerviswoode) decided for the superior. The Court reversed in respect that the superior had not prevented other feuars from departing from the stipulations. Per Lord Jerviswoode—"How other parties have been allowed to erect buildings in face of these rules, or on what conditions they did so, seems scarcely to be relevant for enquiry here. The question for decision here is—Are the defenders entitled to plead laxity on the part of the pursuers in the case of others as a defence against his assertion of his right here?" Per Lord Cowan—"I think there is a distinction between a condition in a feu right, in which the superior is personally interested, and one inserted for the benefit of the feuars. The feuars here have barred themselves from

objecting; the superior has no personal or private interest in enforcing the condition, and by its enforcement neither the utility nor the ornamentation of the street would be served, but the reverse." Per Lord Benholme—"This case was argued by the defenders a good deal on English authorities. On some of these I cannot place much reliance, for they seem to be founded on the speciality in the English practice, that the Courts of Equity and Law are separate, which separation seems in certain cases to necessitate a departure from the principles of absolute justice. I put the case of an injunction claimed in respect of a condition against buildings of a certain class. The Court of Equity not conceiving the right of the party to be clear does not think fit to interfere, but leaves the party complaining to his remedy at law. The result is that the buildings go on and are finished. Ultimately in the Court of Common Law they are found to be in contravention of a valid condition, but that Court cannot enforce specific implement. The buildings cannot be pulled down, and the party must be content with damages. I say that is an imperfect administration of justice, an unjust result, arising from the fact that if the one court is not clear at once about granting the true remedy, the other court has no power to do so in the end, but only gives damages instead of performance."

30 June, 1868.—*Graham v. The Duke of Hamilton and others.*—40 *Jurist*, 555.—(*First Division*).

MINERAL LEASE.

A feuar, the minerals under whose lands were reserved with free ish and entry for carrying away the same, applied for an interdict (injunction) against the superior and mineral tenants for using his lands or passages underground for removing mineral from an adjacent mineral field. The Court refused the interdict, on condition that the tenants should, during the dependence of the action brought to settle the rights of parties, pay such sum for way leave as should be fixed by a skilled person, to be refunded if ultimately found not eligible in law. Lord Deas dissented, holding that all that could be asked was caution for damages in general terms, to be found by the mineral tenants.

July, 1868.—*Nicol v. the Commission of Woods and Forests.*—40 *Jurist*, 557.—(*First Division*).

SALMON FISHING.

*Held* that a barony charter, followed by prescriptive possession, gave right for salmon fishings, though it contained an express grant of white fishings, to which it was sought to be limited. Per Lord Barcaple—"The law holds that by granting the subjects as a barony the Crown intended to include salmon fishings in the grant. The legal construction of the grant is not excluded by the fact that the charter expressly gives the right of white fishing, which could not be conferred in any other form, and must have been separately expressed, whether the right of salmon fishing was intended to be given or not."

H. B.

## Notices of New Books.

---

[\*.\* It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in more elaborate form, in a subsequent Number, when their character and importance require it.]

---

Shelford's Law of Railways, containing the whole of the Statute Law for the Regulation of Railways in England, Scotland and Ireland: with copious Notes of Decided Cases upon the Statutes, Introduction to the Law of Railways, and Appendix of Official Documents. Fourth edition. By W. Cunningham Glen, Barrister-at-Law. In Two Volumes. London: Butterworths. Edinburgh: T. & T. Clark; Bell & Bradfute. Dublin: Hodges, Foster, & Co.—1869.

THOUGH Mr. Glen has built his imposing and valuable work on the foundation of another work which had earned the reputation of being "the best on the subject," he is fairly entitled to the credit of having composed an entirely new treatise on the law of railways. He has, in fact, brought together the whole body of the substantive law of every kind, statutory and judiciary, which in any way relates to railways, in one comprehensive and accessible compilation. Such an undertaking he may well call "arduous," and no one can wade through these two large volumes without realizing that it must have "engaged and exercised the attention of its author during the past five years." Such an exhaustive treatment of the law, in its relation to railways, presents peculiar difficulties. The whole of our railway system has practically grown up within the last forty years. The general Statute Law of railways has entirely grown up within the last thirty-two years. Since the first public Statute concerning railways was passed in the first year of the present reign,\* a large number of public Acts, of which no less than ninety-eight remain unrepealed, have been passed which have created or dealt with the vast aggregate of rights and obligations incident to our great system of railway communication. The effect of some of these enactments has been to bring this system within the scope of a large body of Common and Statute Law already in existence; such, for example, as the law of common carriers. Again, tentative legislation has passed a number of Acts which have been found either quite useless, or inadequate to meet new difficulties;

\* The first public Statute relating to railways is 1 Vict., c. 83

whilst our reports are full of decisions which have either applied old principles to the new state of things, or interpreted the provisions of new laws. To cancel what has been repealed or become obsolete, and to arrange the huge mass of matter, new and old, which remained, in such a way as to make it, at the same time, complete and accessible, was a task of great labour and difficulty, requiring long acquaintance with the subject and high qualities of mind, great patience, research and exactness. Though we have not had the opportunity of going conscientiously through the whole of this elaborate compilation, we have been able to devote enough time to it to be able to speak in the highest terms of the judgment and ability with which it has been prepared. Its execution quite justifies the reputation which Mr. Glen has already acquired as a legal writer, and proves that no one could have been more properly singled out for the duty he has so well discharged. The work must take its unquestionable position as the leading Manual of the Railway Law of Great Britain.

It would be impossible, within the limits of this notice, to do more than give a very general sketch of the plan on which the work has been carried out. We trust that on some future occasion we may have an opportunity for reviewing it in detail.

The subject matter has been arranged in the only manner which can be usefully adopted where the whole law, affecting a particular division of rights, has to be brought together in such a way as to form a really practical law book. As the bulk of our railway law is the creation of direct statutory enactment, the object of the Editor has been to present "in a systematised form the whole of the Statutes relating to the law of railways, and the authoritative expositions of those Statutes proceeding from the judges of the Superior Courts of Law and Equity." This he has effected by dividing the Statutes into two classes. In the first volume he has presented the whole of the Statutes which comprise the general law affecting all railways. The second volume is devoted to those Statutes which, under the title of Consolidation Clauses Acts, are usually adopted by all undertakings of this nature in their special Act. The Acts in each volume are given in their chronological order, with the decisions upon each immediately following. The arrangement is, of course, not scientific; but in the present chaotic and unsettled state of our railway law it would be practically impossible to adopt any other. The only deviation from the arrangement which has been made is that part of the first volume which deals with the assessment of railways to local taxes in England, Scotland, and Ireland. As most of the law on this subject consists of judicial decisions which have applied the general Statutes affecting all property to railway property, Mr. Glen has thrown this part into the form of a concise but complete statement of the general law, and a summary of the decisions by which that general law has been applied to railways. But the most important part of this section is the valuable practical information which is given on the subject of the assessment of railways to the poor rate, and appeals against such rates.

With the exception just mentioned we find all the Statutes set forth as a text, with all the decisions and editorial observations appended to each section to which they refer. And here a tribute is justly due to the publishers. Nothing could be more admirable than the way in which the work has been printed. Not only is the text printed in fine bold type, but the notes are given in a type which, though small, is better and clearer than that in which most treatises are printed. The work includes the whole Statute Law of the United Kingdom which applies to railways, and consequently many Scotch and Irish Statutes swell the bulk of each volume, whilst there is not a section of a public general Act which has any bearing on railway law that is not found in its proper order. For instance, the Larceny Consolidation Statute of 1861 has provisions for punishment of bailees fraudulently converting property, and of directors of public companies who appropriate property, keep fraudulent accounts, or commit other offences. Again, there is a solitary section of the Municipal Franchise Act,\* 1869, which provides that no one shall be deemed to be a contractor with the town council of a borough simply by reason of his having a share in any railway company. Even the Acts of Parliament Abbreviation Act has a bearing on railway law, and the Statute Book is full of general Statutes which contain provisions of a similar character. To make such a work as lies before us complete, all such provisions ought to be included in it, and this Mr. Glen has conscientiously done.

The notes which contain the judiciary law and the general observations of the Editor are full of exhaustive summaries of decisions and able practical comments. Mr. Glen scarcely does himself justice, when he claims only to have given the decisions of the superior courts. He has very properly given decisions of inferior courts where they have appeared to be of sufficient value. We find, for instance, in the long and exhaustive series of notes to the Railway and Canal Traffic Act, the decision of Sir J. Eardley Wilmot, on the *Great Western Company v. Emanuel*, as to the right of possession by a finder of money on the Company's line.†

We can only detect one instance of what seems to us to be an error in arrangement. Under the sections of Lord Campbell's Act will be found not only the decisions bearing upon the rights to compensation for personal injury resulting in death, but other decisions on cases of personal injury which do not come under the provisions of that Statute,‡ and the decisions on cases of personal injury are continued in the second volume under the 89th section of the Railways Clauses Consolidation Act.§ It seems to us that it would have been better to have brought together the whole of the cases relating to personal injury, including the question of contributory negligence and the negligence of servants under one head. This however is a mere matter of detail. The cases seem to have been examined, and their effect to be stated with much care and accuracy, and no channel from which information could be gained has been neglected.

\* 32 & 33 Vict., c. 55, s. 5.    † P. 192.    ‡ Vol. I., p. 95.    § P. 623.

Mr. Glen, indeed, seems to be saturated with knowledge of his subject. His introductory survey of the rise and growth of our railway system, and the legislation bearing on it, is most able and interesting, and the whole work is full of quotations from reports of Parliamentary commissions and committees, which indicate the patience of his inquiries, at the same time that they throw a curious light upon the course of railway legislation. They show how little even able men were able to realize the great social and economic forces to which the steam engine had given birth, and explain what to us, with an experience of thirty years, seems strangely crude and imperfect legislation. They explain also the striking fact that whilst Mr. Shelford's last edition in one volume, octavo, only contained 868 pages, and references to eighty-one cases, the present work has grown into two large volumes, royal octavo, which contain altogether 1755 pages, and references to no less than 2286 cases.

The value of the work is greatly increased by a number of supplemental decisions which give all the cases up to the time of publication, and by an index which appears to be thoroughly exhaustive.

A Digest of Mahommedan Law on the subjects to which it is usually applied by British Courts of Justice in India, compiled and translated from authorities in the original Arabic. Part Second, containing the Doctrines of the Imameea Code of Jurisprudence on the most important of the same subjects. By Neil B. E. Baillie, M.R.A.S. London : Smith, Elder, & Co. 1869.

THIS is the second part of Mr. Baillie's Digest of Mahommedan Law, and is confined to the doctrines of the second school of jurisprudence, called or known as the Imameea or Sheea sect, the first part of the digest having been confined to the doctrines of the other school, known as the Soonnee sect. Haneefa, who was considered by the Mahommedans as the great oracle of jurisprudence, he being the first among them who attempted to argue abstractedly upon points of law, and to apply the reason of men to the investigation of temporal concerns, was educated in the tenets of the Sheeas. He received his first instructions in jurisprudence at Bagdad, from *Imam* Abou Jafir, an eminent doctor of that sect, and heard traditions chiefly from Abdoolah Ibn al Mobarick. After having completed his studies and gained considerable reputation at Bagdad, he returned to Koofa, and there distinguished himself by seceding from his master, Abou Jafir, and teaching civil law on principles repugnant to those inculcated by that doctor. The Sheeas, indeed, ascribe his defection to motives which, if true, divest him of the merit of proceeding in his secession upon internal conviction. But whether their statement be correct or not, it is certain that the dissension which took place

between these two eminent lawyers is considered as the origin of the Sheea and Soonnee jurisprudence. No difference of tenets entered into judicial decisions until upwards of a century after the death of Ali, who perished A.H. 40, when it was occasioned, as we have said, by the defection of Haneefa from the party of the Sheeas. The work under review becomes an important addition to our legal literature, for in consequence of the Soonnees being by far a more numerous and influential sect than their rivals, especially in India, where they comprised the more wealthy and intelligent classes, the writings of that school have received greater attention from European authors than those of the Sheea sect. But as the Sheea sect are becoming daily more numerous and influential, and the charters of justice for India requiring that the law of the defendant is to govern the case where the litigants come into a court of justice, the doctrines of the Sheea school merit particular attention from the student, the practising advocate, and the judge, and any work in an English garb capable of throwing light upon their doctrines, and showing where they differ from the Soonnee school, is an acquisition. The Sheeas, like the Soonnees, are divided into five principal sects, which are again sub-divided into different classes. But although differing in points of faith and religious doctrines, they do not, with few exceptions, hold any variety of opinion in matters of law. The Koran is received as an universal authority. It is in the interpretation of it that the divergence commences, and this differs according to the views of the different commentators of the various sects; the Sheeas more particularly rendering the meaning of many texts in a manner totally opposed to their acceptance by the Soonnees. It is an error to suppose that the Sheeas reject entirely the authority of tradition, for they admit the legality of the Soonna when verified from any of the twelve Imams (from which they take the name of Imaamea), and all equally venerate the precepts and examples of the Prophet and the twelve Imams themselves, and the precepts that have been handed down by the princes and partisans of Ali, rejecting only such portions of the Soonna as have been derived from persons contaminated by crime or disobedience to God. In the latter class they range all the traditions recorded on the authority of the first three Khalifahs and of such of the companions, the Jabidūn and their disciples, as were not included amongst the supporters of Ali Ben Abi Talib. When therefore it is asserted that the Sheeas reject the authority of tradition, it must only be understood to mean that they pay no regard to the Soonnee sects, holding their names in abhorrence. What has been said with regard to the traditions as received by the Sheeas applies equally to the Ijmaa (concurrence), the authority of which depends upon the source from which it was derived. When we say that European authors have devoted little attention to the doctrines of the Sheea school, we do not wish it to be understood that the subject has been altogether overlooked, for both Mr. (Sir) W. H. Macnaughten and Mr. Grady have in their respective works on Mahomedan law devoted a chapter to the doctrines of that school.

But the work under review being devoted exclusively to that branch of the law, enters more fully and completely into it. The first book treats of the subject of Nikah or marriage; the second book, of Divorce; the third book, of Shoofa or pre-emption; the fourth book of Hebbat or gifts; the fifth book of Wookoof and Sudukat, or appropriation and alms; the sixth book of Wills; the seventh book of Inheritance. It will be seen that this includes the whole range of the law upon which a divergence between the two sects has taken place. The author informs us that the work, with the exception of the last book, is composed entirely of translations from the *Shuraya-ool-Islam*, a work of the highest authority, which has entered largely into the "*Digest of Sheea Law*," compiled under the superintendence of Sir William Jones. Our author's work is conspicuous for the clearness with which the doctrines are enunciated, and he takes care to state what the law of the Soonnee sect is upon the same subject. As the work is a translation, it would have been a matter of great convenience, if not of absolute necessity, if the author had made more frequent reference to the pages of the original work, so as to afford an opportunity of verifying the translation. The eighth book is a very valuable addition to the work, inasmuch as it is new. It is an additional treatise on the law of inheritance. The account the author gives of it is that "it is from a manuscript which had come to his possession as one of the executors of the late Lieutenant-Colonel John Baillie, the translator of the first and only volume that was ever published of the digest of Sheea law. It is carefully copied in the handwriting of the translator, and has all the appearance of being a further portion of the same work, and of having been finally corrected by himself for the press." Mr. Baillie has placed the coping stone upon his work by an index, consisting of only eighteen pages of a single column in each. We have tested the facilities afforded by this index, and find it most deficient. The practitioner will experience great difficulty in finding anything he wants in the work. The author should bear in mind that the most valuable part of a law book is its index. If that be deficient the work is useless, for few men can afford to waste time in running through a legal work to find out what they require.

**The Law relating to Industrial and Provident Societies (including the winding-up clauses), with a Practical Introduction, Notes, and Model Rules; to which are added the Law of France on the same subject, and Remarks on Trades' Unions. By E. W. Brabrook, F.S.A., Barrister-at-Law, and of the Friendly Society's Registry. London: Butterworths. 1869.**

At the present time, when so much public attention is directed towards the working of Industrial and Provident Societies and Trades' Unions, with all their unenviable notoriety, Mr. Brabrook's little work on these Societies is opportune, and the statistics and



information contained in it are valuable and interesting. With regard to Industrial and Provident Societies, they are the creatures of the Legislature, which has defined them to be Societies for the purpose of carrying on labour, trade, or handicraft, whether wholesale or retail (except the business of banking), and of applying the profits for any purposes allowed by the Friendly Society's Acts, or otherwise permitted by law; and that an Industrial and Provident Society is an association of working men, each of whom contributes not only a small amount to the working capital and to the foundation expenses, but also his own labour in that branch of industry practised by the Society. The member receives for his labour the rate of wages current in his trade and district, and for his capital a certain nominal rate of interest. The profits that remain over are appropriated from time to time, in proportion to the capital and labour together. Unless required to be withdrawn they are added to the capital, and form a provident fund for the members' wants for the future. Societies for actual production, however, are comparatively few. The great majority confine their functions to the purchase and distribution of provisions or other commodities. In these the members contribute their small capitals and their patronage, and the surplus profits are divided in proportion to the capital and the sales. Simple and beneficial as such objects and methods appear to be, it was long before industrial partnerships gained public confidence or met with legal recognition, and even then the privileges of incorporation were doled out in gradual instalments. In this respect these societies have shared the fate of Joint Stock Companies generally. It seems to be the genius of English law not to encourage partnerships. Five-and-twenty years ago these Companies had to be formed by private deed, which rendered each member liable to his last shilling and his last acre for all debts contracted on behalf of the general body. In 1844 Parliament provided for Joint Stock Companies' registration and publicity, but did nothing to release the members from that liability. In 1855, for the first time, a man was permitted to join others in business without risking his ruin. In 1865 a kind of clumsy imitation of the French *Société en Commandite* was rendered possible. At first industrial partnerships were viewed with distrust, which circumstances in their early history justified. They became associated with wider and wilder schemes enunciated by their promoters, who probably regarded these stores as part of a socialistic organisation. Our author traces the origin of the familiar name of Co-operative Societies, and observes that their first legal recognition occurs in the Friendly Societies' Act of 1846, which extends the benefit of registration to societies "for the frugal investment of the savings of the members for better enabling them to purchase food, firing, clothes, or other necessities, or the tools, implements, and materials of their trade or calling, or to provide for the education of their children and kindred." He then traces the progress of legislation and gives the result in these words:—

"By these Acts the liability of a member is expressly limited to

the amount of his share, and to one year after he has ceased to be a member. An Industrial and Provident Society is made a corporation, with a common seal and power to hold land, and accordingly sues and is sued in its registered name. Provision is also made for winding up by the County Court of the district, in the same manner as companies are wound up in the Court of Chancery."

The principles upon which these institutions are based and worked are pointed out, and the statistics of several of the most flourishing and important of them, as given by Mr. Brabrook, are very satisfactory and interesting. There is a chapter devoted to practical advice, in which are contained many valuable and important hints. There is also a chapter devoted to French law upon the same subject, and Part VI. is devoted to the law of Trades' Unions.

**A Practical Guide to the Bankruptcy Law of 1869; being the Bankruptcy and Debtors' Acts, 1869, Condensed and Simplified, with Notes, Reference, Tables, and Index.** By Joseph Seymour Salaman, Solicitor. London: Richard Groombridge & Sons. 1869.

**The General Public Statutes relating to the Law of Bankruptcy and Insolvency, passed in the Session 32 & 33 Vict., 1869, &c., with Copious Index.** By James Biggs, Esq. London: Waterlow & Sons. 1869.

**MR. SALAMAN** has done good service to the public, as well as to the profession, by his *Practical Guide to the Bankruptcy Law of 1869*. Neither the Bankruptcy Act nor the Debtor's Act can be considered as a model of lucid expression and logical arrangement. Mr. Salaman has accordingly condensed and simplified as much as possible the wording of the Acts, and has brought together the different sections relating to the same subjects, and arranged them in a convenient order. This work is therefore an analytical digest of the Acts, and will be found extremely useful to those who wish to know the provisions of these important Statutes. We have found the work valuable as an introduction to the study of the new law. In practice we have no doubt it will be found extremely convenient. To non-professional men who may be called on to perform the duties of trustee under the new system, we can very safely recommend it. Mr. Salaman has added a few practical observations, in the form of notes, with reference to certain difficulties which arise on some of the sections of both Acts. These are in general acute and sensible, but with respect to some of the difficulties suggested, a reference to the Bankruptcy Act for Scotland, and the practice under it would show what was intended. There are useful tables of times, resolutions, majorities, and penalties. A copious index has been added, and the work has been neatly got up.

Mr. Biggs gives merely the text of the Debtors' Act, the Bankruptcy Act, and the Bankruptcy Repeal and Insolvent Court Act of last session, with an index. His publication has the merit of presenting these Acts in a form convenient for ordinary reference, and in the least bulky shape. For practitioners who wish to carry the Acts with them into Court, this edition will be found extremely useful. The index has been very carefully prepared.

**Recent Discussions on the Abolition of Patents for Inventions in the United Kingdom, France, Germany, and the Netherlands; with Suggestions as to International Arrangements regarding Inventions and Copyright.** London: Longmans & Co. 1869.

We are indebted to Mr. Macfie, M.P. for Leith, for this extensive collection of opinions on the abolition of patents. As the subject is likely to occupy public attention for some time, the present work is not without interest. The matter to which it relates is of vast importance in such a community as ours, and, however decided, will affect in no inconsiderable degree our national prosperity. In another part of this number will be found a valuable contribution on Reform in the Law of Patents, in which an opposite view to that taken by Mr. Macfie is supported. We would direct Mr. Macfie's attention to the arguments there brought forward.

**The Land Difficulty in Ireland, with an Effort to Solve it.** By Gerald Fitzgibbon, Esq., Master in Chancery. London: Longmans & Co. Dublin: McGlashan & Gill. 1869.

We cannot congratulate Mr. Fitzgibbon on the appearance of this pamphlet. We do not agree with him in regarding tenant-right as a delusion, and we look on his plan for solving the land difficulty as unworkable, insufficient even if it could be worked, and as involving an unnecessary interference between landlord and tenant.

**The Poor Rate Assessment and Collection Act, 1869, with Notes.** By Hugh Owen, jun., Esq., Barrister-at-Law. London: Knight & Co., 90, Fleet Street.

THIS Act, which came into operation on the 29th of September last, is intended to remedy the difficulties of collecting rates, and the hardships inflicted upon small occupiers under the Representation of the People Act, 1867. As considerable alterations in the method of collection, and the liabilities of owners and occupiers, have been made by this Statute, a clear and popular exposition of the law by a writer whose official position enables him to write with authority upon the subject, is at the present time most valuable. Mr. Owen, jun., in the little work before us, opens with an introduction, in which he traces the history of the measure and its probable effects; then fol-

lows the text of the Statute with copious notes, containing references to the Articles of the Poor Law Board, and to recent cases decided, and then a careful index completing this useful manual. The principal provisions of the Act are—that the occupiers of tenements let for short terms may deduct the poor rate paid by them from their rents, but shall not be compelled to pay the overseers at one time, or within four weeks, more than a quarter of a year's rate; that owners, if they agree to pay the rate, shall be allowed a commission; that vestries may order the owner to be rated instead of the occupier, and that if the rates be unpaid by the owner, the property of the occupier may be distrained upon. The remarks of the learned author upon these sections will be found of great practical utility to overseers of the poor, to landlords and tenants, as well as to those who have the administration of the law. His style is perspicuous, and while nothing of value has been omitted from the work, it is certainly not burdened with useless matter. The price of the book is small, and we have no doubt that many readers will reward Mr. Owen's labours. We have offered no remarks upon the policy or impolicy of this enactment, but we trust the day is not far distant when there will be but one assessment throughout the country for both rates and taxes, and that then the small occupiers may be released from the weight of taxation which, in the poorer parishes of our metropolis, presses them down nearly to the level of those for whose support they are taxed.

Representative Government, its Evils and their Reform. A Lecture delivered by Simon Sterne at the Cooper Union, New York. 1869.

BETWEEN two and three years since admirers of American institutions and self-government were startled by a remarkable article in the *North American Review*, wherein the writer described the municipal government of his native city, New York, as disgraceful; the judges of the criminal courts as coarse and overbearing, while many of the members of Assembly were accessible to bribes. Mr. Sterne, in this lecture delivered to fifteen hundred citizens of New York, with some boldness undertook to prove "that in many things we are not quite so well off as the so-called rotten and effete governments of Europe." To some minds home evils assume too important a magnitude, and for the sake of the United States we trust that the long catalogue of defects in their political government imputed to them by Mr. Sterne may be somewhat exaggerated from this feeling. The power of party managers and party government is strongly deprecated by Mr. Sterne, and instances are given by him which prove the almost prophetic accuracy of Lord Brougham, when he described the despotism of democracy in some such words as these. "When the predominance of one party in a democracy has once been fully established, there is no safety for those who differ with it by ever so slight a shade. The majority is

overwhelming, and all opposition is stifled. No man dares breathe a whisper against the prevailing sentiments; for the popular violence will bear no contradiction." The lecturer then repeats the charges already made against the judges, and asks with indignation "Of what use are Bills of Rights if the judges lend their countenance and support to their infringement? When railway kings can dictate a judgment, and political wire-pullers guide the hand which is to decide between conflicting claims of citizens, then you will live under a government—whatever be its form or name—compared with which Turkey is a democracy and Russia a republic." Our writer's remarks upon the majority representation are worthy of consideration, and the following passage is a friendly warning to this country—"It would be far better for the English never to have manhood suffrage than that they should succeed there, as we have done here, to swamp the more intellectual and cultivated part of the community. *In this particular we are a lighthouse as well as a beacon.*" We can quite understand that this lecture, evincing as it does some depth of thought and much earnestness of feeling, should have produced a considerable impression on Mr. Sterne's audience, and we, for our part, are grateful to them for having induced him to publish it.

We have received "The Argument of Mr. Simon Sterne in the Case of The People *ex rel.* Stephen Crowell and Others, Appellants, against John D. Laurence and Others, Respondents," being a spirited and learned attack on "the legislative assignments to a private corporation of the right to tax a number of citizens of the state, and to take from them, under the guise and semblance of the taxing power, a part of their property for its own use and benefit, and without their consent."

A Dissertation on the History of Hereditary Dignities, particularly as to their course of Descent and their Forfeiture by Attainder, with special reference to the case of the Earldom of Wiltes. By W. F. Finlason, Esq., Barrister-at-law. London: Butterworths. 1869.

THIS is a review of the decision of the Committee for Privileges in the Wiltes' Claim of Peerage. Mr. Finlason has brought forward a large amount of learning, and argued with much ability in favour of the claim. The important question in the case was, whether a grant of an earldom to a man and his heirs male for ever created a dignity descendible to his heirs male general. In our last number we entered at some length into this question; and we can now only state that Mr. Finlason has added some very powerful arguments to those which we then brought forward against the decision of the Committee. On the other question, as to whether the earldom granted to Sir William Scrope was determined by attainder, or forfeiture, or in some other manner, Mr. Finlason has also argued with great force against the views adopted by the Committee. If the

claim should again be brought forward, the elaborate dissertation of Mr. Finlason will be found extremely useful ; but even as an inquiry into an important question of peerage law, it cannot fail to have much interest for not a few readers.

**Magisterial and Police Handbook.** By a Barrister and Chairman of Quarter Sessions. Containing instructions on various points connected with their duties ; for the guidance and assistance of Magistrates and Police Officers. Worcester : G. Williams. 1869.

AN authoritative work on police duties, by an author of some standing, would be a most desirable addition to the law libraries, not only of constables but of magistrates. The majority of so-called police instruction books are complicated, and behind the time. Their compilation has, for the most part, been undertaken by men deficient in legal training. Those written by military men have naturally turned too much on mere discipline, while those by inferior officers of police are usually confused and wanting in arrangement. The disappointment felt by us while perusing the different instruction books has been materially increased by the defects in the work before us. This may perhaps have arisen from the fact that the position of the writer had induced us to presume his intimate acquaintance with the subject, and a knowledge of the necessity of accurate language. We conceive that a work of this nature should not be undertaken carelessly. The present position of the police in the estimation of the nation is scarcely satisfactory, and the slightest error of judgment on behalf of individual members of the force will go far to augment the unfortunate distrust of the body which has lately been so freely expressed. Therefore, more especially now than ever, it is the bounden duty of those who undertake to instruct the police to do so in words that cannot be misunderstood save by almost wilful stupidity. We are at a loss to see what want the work before us was intended to supply. It certainly is worthless as a guide for the police, while the works of Messrs. Stone and Oke, whatever their defects, are infinitely superior for the use of the magistrates.

At the very starting we have, "a constable may apprehend a party *guilty* of treason or felony without any warrant." We do not desire to make captious objections, but we cannot protest too strongly against encouraging constables to believe themselves judges of the guilt or innocence of the accused ; the majority of them are far too anxious to presume guilt. This instruction is neither good in law nor policy ; many maxims from Burns follow, which certainly in the present condition of public feeling it would be most unwise to carry into effect.

When the writer states that a constable can only apprehend in cases of misdemeanour where the offence *is committed* in the presence of the constable, he misstates the law, which says that the

person must be found committing the offence. We have not the space nor the inclination to follow the writer through similar defects, but we consider the omission of authorities, thus leaving the reader at the mercy of the author's reading, and the incompleteness of the index, are grave faults in a book of this nature. We trust that, should the author see fit to issue another work, he will take greater pains to render his production, at the least, accurate and intelligible.

An Historical Sketch of the French Bar, from its Origin to the Present Day; with Biographical Notices of some of the Principal Advocates of the Nineteenth Century. By Archibald Young, Advocate. Edinburgh: Edmonton & Douglas. 1869.

We must reserve for a future occasion our observations on this very interesting volume. By a cursory glance it is quite evident that a considerable amount of research has been bestowed upon it, and an accumulation of historical matter recorded which no doubt has not been easily obtained, but which renders the task of the reviewers all the more difficult. By the British advocate the book we are sure will be read with satisfaction.

---

## *Events of the Quarter, &c.*

---

### THE SITE FOR THE NEW LAW COURTS.

THE following is the Report of the Committee appointed to hear evidence as to the site of the New Law Courts :—

“1. Your Committee have taken into consideration the matters referred to them, and have examined professional and other witnesses of experience and eminence.

“2. They find that in 1842 a Select Committee was appointed ‘to consider the expediency of erecting a building in the neighbourhood of the Inns of Court for the sittings of the Courts of Law and Equity, with a view to the more speedy, convenient, and effectual administration of justice.’

“3. Inquiries were renewed, by direction of Parliament, from time to time, and a Royal Commission issued in 1859, whose recommendations all tended to that object.

“4. In accordance with the Report, made in 1860, of the Royal Commission, which included the present Lord Chancellor, Sir J. T. Coleridge, and the late Sir G. Cornewall Lewis, an Act was passed in the year 1865 authorising the purchase of a large area, since cleared, lying between the Strand and Carey Street, and containing seven and a half acres.

“5. By a second Act of the same session the cost of the site to be thus acquired, and of the buildings to be erected upon it, was provided for partly by 1,000,000*l.* of stock standing to the credit of the Suitors’ Fund in the Court of Chancery, and partly by a redemption annuity, extending over a period not exceeding fifty years, to be levied by fees on suitors.

“6. The acquisition of the property and its clearance have occupied a period of nearly four years, and the cost of the purchase and clearance has amounted to a sum exceeding 800,000*l.*

“7. A Royal Commission, dated June 29, 1865, was issued appointing the Lord Chancellor and many of the Judges and other persons, ‘to advise and concur with the Treasury as to the plan and arrangements of the intended New Courts,’ and during the period which has been occupied in acquiring and obtaining possession of the site the Commissioners have, from time to time, recorded their opinion as to the courts and offices necessary or desirable to be provided for.

“8. Under the Thames Embankment Act, passed in 1862, a space of ground lying between Norfolk Street, Surry Street, Arundel Street, and the river was reclaimed, and directed to be set apart for the use of the public as ornamental ground.

“9. Upon this ground and the space lying between it and the Strand, a scheme was proposed, early in the present session, for



erecting new Courts of Law and offices, instead of erecting them on the Carey Street site, acquired under the Act of 1865. This design was subsequently limited to an area comprising the houses and buildings to the south of Howard Street, and about an acre and a quarter of the reclaimed land, and involving, for the sake of approaches and air, the demolition of part of the houses on the north side of Howard Street.

"10. Mr. Street, whose plans for the building on the Carey Street site had been sanctioned by the Royal Commission, was directed by the First Commissioner of Works to prepare a set of plans adapted to the lesser Embankment area, consisting of six acres, and likewise plans on a reduced scale suited to the seven and a half acres of the Carey Street site.

"11. Thus the Committee had before them, on the north of the Strand, seven and a half acres, forming the Carey Street site, already purchased and cleared, and from which upwards of 4,000 resident occupiers had been removed, and on the south of the Strand, below Howard Street, a site to the extent of six acres, about four and a half acres of which are still covered by houses and buildings.

"12. From the fullest consideration of all the circumstances of the case, and of the facts stated in evidence before them, your Committee have come to the following conclusions:—

"13. They are of opinion that the Carey Street site, upon the whole, affords the best opportunity of concentrating the Courts and offices in the centre of the great legal district lying between and nearly equi-distant from Lincoln's Inn and the Temple; and that it would be greatly to the public advantage that this site should be adhered to, and the new Law Courts and offices erected thereon, as sanctioned by Parliament in the Act of 1865.

"14. The evidence received by your Committee has satisfied them that the convenience of the public cannot be separated in the main from that of the legal profession, and that the economy of time which would result from placing the Law Courts in immediate proximity to the chambers of the practising barristers and solicitors would tend to the direct advantage of the suitors. On the other hand, the placing of the Equity Courts on the Embankment site would, in the judgment of your Committee, be of serious detriment to the public and the profession, and materially diminish, if not destroy, the benefit which has accrued from the transfer of the Chancery Courts from Westminster to Lincoln's Inn.

"15. With regard to facility of access, your Committee are impressed with the conviction that for all ordinary purposes connected with the Courts no great additional expenditure need be incurred should the Carey Street site be adopted; while they desire to call attention to the fact that the increased accommodation likely to be afforded by the Embankment, the river, and the contemplated railway must be taken into account as available, in the case of strangers, for the Carey Street site, to nearly the same degree as for that of Howard Street.

"16. The Carey Street site admits of a building the same size as that proposed to be placed on the Embankment site, with an area available for improved approaches.

"17. The reasons for any improvement in the approaches that may be desirable upon the north of Carey Street would equally apply if the building were erected on the Howard Street site.

"18. It is alleged that the shape of the Carey Street site presents certain inconveniences, from the irregular shape of the western boundary; but your Committee believe that the site may be made available for the reduced scheme without any additional purchases, by a give-and-take arrangement with Clement's Inn, and that if any additional purchase of ground were found necessary the cost of such purchase might be met by the sale of a portion of the ground already acquired.

"19. Mr. Hardwick and other witnesses have stated their opinion that no difficulty whatever would exist in securing purity of air, adequate ventilation, and sufficiency of light in buildings erected on either site.

"20. The Carey Street site, then, being in the opinion of your Committee the most convenient for the accomplishment of the main objects of the proposed concentration, they proceed to consider whether, with relation either to cost or architectural effect, it would be wise to abandon the present Parliamentary site.

"21. Your Committee have carefully weighed the conflicting statements laid before them regarding the question of cost.

"22. The estimated expense of acquiring the Howard Street site and widening Essex Street, which Mr. Street and Mr. Hunt concur in regarding as indispensable, would be as large as that already expended on the Carey Street site as it now stands.

"23. If the Carey Street site were abandoned a considerable loss must inevitably occur on its re-sale, which Mr. Pownall, Mr. Hardwick, and Mr. Oakley agree in putting as high as 436,000*l*.

"24. Mr. Hunt, indeed, says in his evidence that he has been in communication with a gentleman representing, according to his own statements, some very responsible persons, who are willing to take the Carey Street site and lay it out for building purposes at an ultimate rent equivalent to  $3\frac{1}{2}$  per cent. on 780,000*l*.; but that, although the ultimate rent will be  $3\frac{1}{2}$  per cent., there must be a period of time when all the rent cannot be obtained, and so Mr. Hunt puts it at 3 per cent.

"25. Even assuming that all Mr. Hunt's expectations could be realised, the very least amount of loss which can be calculated on is 34,000*l*. per annum for four years for interest of money.

"26. The evidence has satisfied your Committee that the area already acquired, and which is ready for the commencement of building, is sufficient for the erection of the Courts of Law and the offices on the reduced scale contemplated in the plan prepared for the Howard Street site by direction of the First Commissioner of Works.

"27. If at any future period additional accommodation should be

required, the ground in the neighbourhood of the Carey Street site would be obtained at a probably lower price than that in the neighbourhood of Howard Street; the latter site being bounded by King's College on the one side and the Temple on the other, any extension would have to take the direction of the very expensive block of buildings on the south side of the Strand.

"28. There is so much difference of opinion in your Committee as to the comparative advantages of the two sites in point of architectural effect, that they are unable to report upon that subject.

"29. Looking at the delay that has occurred since the passing of the Act, and the further suspense that would be unavoidable in obtaining the powers for and the compulsory purchase and clearance of another site, and considering that no paramount reasons have been submitted to the Committee for a change in the original design, your Committee recommend that the Carey Street site be retained, and that the New Law Courts and offices be erected thereon.

"July 30, 1869."

#### CLERK OF ASSIZE.

THE following is the report of the Committee, consisting of Mr. Justice Brett, Mr. Selater-Booth, and Mr. M. Law, appointed by the Treasury to inquire into the duties and salary of clerk of assize:—

"In compliance with the directions contained in the Treasury minute of May 25, 1868, we have instituted an inquiry into the duties and salaries of clerks of assize and their officers, in order to ascertain whether such duties were of a nature requiring professional training, whether, having regard to the work to be performed, the existing salaries and allowances are not too high, and whether it might not be possible hereafter to abolish some of these offices and consolidate their duties.

"The clerks of assize have both civil and criminal duties to perform on circuit. In their civil capacity they act as associates in the Nisi Prius Court, and they discharge the functions of clerks of the Crown in the Criminal Court.

"Prior to the year 1856 the clerks of assize were entirely remunerated by fees, out of which they paid the stipends of such assistant officers as they found it necessary to employ, and all the expenses of their offices. The Nisi Prius Officers' Act, however, which was passed in 1852, empowered the Treasury, with the assent of the three chief judges, to fix salaries to be received by clerks of assize in lieu of all fees and emoluments taken by them for their duties as associates, and on each vacancy in any office to revise the salary so fixed; and the Criminal Justice Act, which passed in 1855, abolished all fees payable to clerks of assize for the performance of their duties as clerks of the Crown, and extended the provisions of the Act of 1852 to the payment of these officers by salaries for their duties in the Criminal Courts, and for all other duties appertaining to the office. The last-named Act also empowered the Treasury to fix the salary to be allowed to any subordinate officer employed by a clerk of assize.

"Acting upon the powers thus conferred, the Lords of the Treasury, by two minutes, dated in 1856, prescribed, with the sanction of the three chief judges, the remuneration to be thenceforth received by the clerks of assize and their subordinate officers.

"These minutes proceeded upon the principle that the Western, Oxford, Home, Midland, and Northern circuits might be placed in the same category as regarded their importance, and that the Norfolk held an intermediate position between the five circuits above mentioned and the two Welsh circuits.

"It was at first proposed that the clerks of assize on the five principal circuits should receive salaries of 800*l.* a year, but eventually the remuneration was fixed at 1000*l.* a year, to cover all expenses incidental to the office, except travelling and subsistence on circuit, for which a sum of 2*l.* 2*s.* per night was sanctioned. The subordinate officers for these five circuits were respectively designated, clerk of indictments, clerk of arraigns, associate, circuit bailiff; and for the three first of such officers, salaries were fixed of 200*l.* per annum, rising by 20*l.* annually to 400*l.*, with 1*l.* 10*s.* per night when absent on circuit; for the bailiff, a salary of 100*l.*, with 10*s.* a night on circuit.

"Permission was also given to the clerk of assize to select one of the three officers first named to act as his deputy, and to the person so selected an additional salary of 100*l.* per annum was assigned.

"No salary was at that time fixed for the clerk of assize on the Norfolk circuit, who was an officer far advanced in years and of long standing, but he was permitted to retain the commuted allowance which he had received for some years under the provisions of the Act of 1 Wm. IV., c. 58, and during his continuance in office to employ a deputy clerk of the Crown, acting also as clerk of arraigns, with 300*l.* per annum, rising by 20*l.* to 400*l.*; a clerk of indictments and an associate, with 200*l.* per annum respectively, advancing by the same rate of increment to 300*l.*; and a circuit bailiff at 100*l.*

"These officers received the same subsistence allowance as on the other circuits.

"For the clerks of assize on the North Wales and South Wales circuits, salaries of 500*l.* per annum each were settled, with a travelling and subsistence allowance of 2*l.* 2*s.* per night; and they were allowed the services of a principal assistant officer, with 300*l.* a year, and a second officer with 150*l.*, the latter salaries covering the expense of locomotion and subsistence.

"As the fees received by the clerks of assize in civil causes were not abolished by the *Nisi Prius* Act, they continued to receive these fees, and to account for them, *pro tanto* of their salaries, until the passing of 28 Vict., c. 45, since which period these fees, in common with all the fees of the Superior Courts, have been collected in stamps.

"The only material alteration which has since taken place in the amounts above stated has reference to the Norfolk and Midland circuits. The death of the late Mr. Edgell, in 1863, rendered it necessary to fix a salary for the clerk of assize on the Norfolk

circuit, and the Act of 26 & 27 Vict., c. 122, which was passed at about the same period, gave power to Her Majesty in Council to alter the circuits, by withdrawing counties from any one circuit and annexing them to another; and it empowered the Board of Treasury, with the sanction of the chief judges, to make such changes in the amount of salaries of the clerks of assize as might appear to be required in consequence of the alteration of their circuits. Accordingly the Northern circuit was altered by the withdrawal from it of the county of York, which was annexed to the Midland, while the counties of Leicester, Rutland, and Northampton were detached from the Midland and added to the Norfolk circuit. The Treasury did not see fit at that time to make any alteration in the emoluments of the clerk of assize on the Northern circuit, who has held that office for a very considerable period, and who, under an arrangement made in 1851 by the then Board of Treasury, is in receipt, in addition to his salary, of an annual allowance of 1050*l.* for special services connected with the taxation of costs on his circuit, by which he has been the means of saving a large amount to the public. Having waited, however, for two years to test the effects of the change, the Lords of the Treasury, by a minute in 1866, sanctioned an addition of 100*l.* per annum to the salary of the present clerk of assize on the Midland circuit, in consideration of the increased trouble and expense which he had incurred by the annexation of Yorkshire to his circuit. At the same time the salary of the clerk of assize on the Norfolk circuit was fixed at 900*l.* per annum, and he was allowed, as on the other circuit, the services of three officers, acting in the same capacities, and receiving 200*l.* each, rising by 20*l.* a year to 300*l.* The only other modification which has been made in the arrangement of 1856 consists in the concession of the two officers on each of the Welsh circuits of the same rate of travelling and subsistence allowance as is enjoyed by the officers on the other circuits.

“In order to form an opinion of the nature of the duties transacted by the clerks of assize, we requested the attendance of some of them, and also of some of their officers at the Treasury, for the purpose of answering such inquiries as we might consider it desirable to put. We did not think it necessary to request the attendance of every clerk of assize, inasmuch as the duties to be discharged are so far similar that a recapitulation of them on one circuit would enable an opinion to be formed of the character of the business on all, due regard being had to the differing extent of the civil and criminal business on different circuits.

“The following is a summary of the information with which we were furnished as to the duties discharged by clerks of assize and their subordinates previous to and during the several circuits:—

“On being furnished by the gaolers of the several county and borough gaols in his circuit with returns of the prisoners for trial, the clerk of assize attends the judges who are going his circuit, submits the returns to them, and also such information as he can obtain as to the extent of civil business at the several assize

towns, in order that the judges may fix the days for opening the commission in each place.

"The next step is, to give notice to the Crown Office of the days fixed, in order that the commissions may be drawn up, to prepare the assize precepts to be issued to the sheriffs commanding them to summon jurors, &c., to get them signed and sealed, and then to serve them. It may also be necessary to communicate with the sheriffs as to the number of special jurors required.

"Before leaving for his circuit, the clerk of assize obtains and takes charge of the commissions, which he reads in open Court at each assize town. On circuit he receives all the depositions in cases for trial, and from these, as well as from instructions which may be given to him, it is his duty to prepare all the indictments, except in some prosecutions undertaken by the Government, in which the indictments may be prepared by the solicitor of the department prosecuting. If subpoenas are required for witnesses who have not been bound over, or if any information is wanted by attorneys or others on points of practice, reference would be made to the clerk of assize. When the trials commence, the clerk of assize, or one of his officers, attends in the Criminal Court during the entire sitting, to call the jury, arraign the prisoners, take recognisances, record all the proceedings and judgments, and to draw up and issue the orders or sentences of Court for penal servitude, &c. As each trial concludes, it is the duty of the clerk of assize to tax the costs of the prosecutor and witnesses, and now, under the recent Statute, the costs also of the witnesses for the defence, and to draw up the orders of Court upon the treasurer of the jurisdiction for the costs allowed. At the termination of the business in the Crown Court, the clerk of assize, in communication with the gaoler, is required to draw up the calendars containing the names and offences of the prisoners, their sentences, &c., to be signed by the judge, and a copy of which is required by law to be sent to the Home Office. It is likewise his duty to prepare all lists of forfeited recognisances and fines imposed for the judge's signature, to estreat the fines, &c., make out the estreat roll and writs to be served on the sheriffs, in order that they may levy the forfeitures, to serve them, and to send duplicates of the roll to the Treasury. Under the last Jury Act, it would also be the province of the clerk of assize to correspond with jurors who have been fined, require them to forward affidavits of the cause of their non-attendance, and submit the same to the judge for his directions.

"In the Civil or Nisi Prius Court the clerk of assize is required to receive, examine, and enter all records for trial; to attend the Court during the entire sittings, receive and cancel the stamps by which the fees are now paid, record all the proceedings, and to draw up all orders of reference, certificates, and postea, or judgments of the Court, all matters of considerable legal technicality, and to deliver the latter to the parties interested, when called upon to do so. He has also to enforce the fines which may be imposed on jurors for non-attendance. It is a part of his duty to see that all docu-

ments tendered in evidence, and liable to stamp duty, are duly stamped. He may also be called upon to sit as arbitrator, if required.

"In addition to his duties on circuit, it is necessary that the clerk of assize should have an office, generally in London, at which all the records of the circuit are kept, and he is required, on application at any time, to deliver the postea, to draw up and sign certificates of conviction (under a heavy penalty if incorrect), and to furnish copies of depositions and other proceedings, if required. He may be called upon to make returns to all writs of certiorari from the Queen's Bench, and to make up all records in cases of error; and in addition to the criminal returns of each assize, the clerk of assize has to send to the Home Office an annual return of all civil business transacted on circuit.

"From what has been before stated, it will be apparent that the whole of the administrative business of the Criminal and Nisi Prius Courts on circuit is vested in the clerk of assize. He is responsible for putting the entire machinery in motion, and for its correct working at every stage. He may personally perform any part of the duties of his office, which he sees fit to undertake, and either attend as associate in the Civil Court, sit as clerk of arraigns in the Crown Court, or devote his time to the taxation of costs.

"The duties of his officers are primarily those designated by their names; thus the preparation of the indictments devolves on the clerk of indictments, and the clerk of arraigns and associate attend respectively in the Criminal and Civil Courts to conduct the business thereof. Practically, however, the labours of the officers are by no means confined to the duties strictly appertaining to their offices. The time allotted to the business at each assize town is rarely more than is sufficient for its proper discharge, and occasionally not sufficient, and the united exertions of the clerk of assize and his officers are required to enable them to keep pace with the cases as they are disposed of by the Court. Directly the grand jury have found true bills on the indictments laid before them, the trials commence; and as each trial terminates it is highly desirable that the costs should be at once taxed, and the prosecutor and witnesses be paid their expenses, because each day that they are detained at the assize town adds to the cost of the trial, and to the charge upon the public funds, which ultimately bear the expenses of criminal prosecutions. We were assured, moreover, that this taxation requires some delicacy, and the exercise of a good deal of discretion, because, although the actual expenses are measured by a fixed scale, the charges for professional labour are necessarily dependent on the nature and circumstances of each case, and require to be carefully watched.

"It is also by no means uncommon to have two, and even more, Courts sitting at the same time for the trial of criminal cases. So soon as the civil business, which on the majority of circuits is light in comparison with the criminal, has been brought to a conclusion, the Nisi Prius judge will proceed to try prisoners, in which case the associate may be called upon to act as clerk of arraigns in his Court.

"It is also not unusual for one of the leading barristers named in the commission to assist the judge in the trial of criminal cases in another Court; and for each Court that may be opened, the clerk of assize must provide an officer. We were assured by all the gentlemen who attended before us, and we see no reason to doubt their testimony, that, during the continuance of the assizes, it is absolutely necessary for the clerk of assize and all his officers to be in constant attendance to keep down the work, and prevent its getting into arrear.

"For these reasons we are of opinion that, although the circuits do not, on an average, occupy more than from three to four months every year, and although at other times the attendance of one officer at the office in London is sufficient to meet all requirements, it is not desirable to reduce the number of the officers subordinate to the clerk of assize, or to consolidate their offices. It might indeed be considered that, as the active demand on the time of these officers does not extend over more than a third of the year, it would be a preferable course for the clerk of assize to engage such assistance as he might require for the actual duration of each circuit, rather than to keep up a staff for whom no sufficient employment can be found during the remaining two-thirds. Looking, however, to the high importance of having trained and practised men for the discharge of these duties, not only with a view to the interests of justice, but to the saving of public money in the quick taxation and settlement of costs, and as men so qualified could hardly be obtained on any other than a permanent footing, we are not disposed to recommend the adoption of any such provisional arrangement.

"We have stated that, during the continuance of the circuits, there is ample work for the clerk of assize, as well as for his officers, and we were assured that if the former did not attend himself, he must send a deputy. He has power to discharge the duties by deputy if he pleases, but this power is now very rarely exercised. Seeing, however, that the greater portion of the business on circuit is no doubt discharged by the subordinate officers, and that the clerk of assize is under no obligation to attend personally, we took into consideration whether it was necessary for the due performance of the business to retain a highly salaried officer at the head of the establishment, or whether the duties could not be equally well performed by the engagement of an additional assistant of the same status, and receiving the same amount of pay as is now found sufficient to insure the services of competent persons for the subordinate posts.

"We are bound, however, to say that the opinions of those whom we consulted, not only of the clerks of assize, who might naturally be opposed to any such proposition, but also of their officers, were adverse to the discontinuance of the superior office, and, on full consideration, we are disposed to agree that such a change would not be desirable.

"It seems necessary to have an officer in whom the superintendence and control of the whole administrative business of the assizes is vested, who shall be responsible for every department of work, to



whom the public and the practitioners may look for the information required in the conduct of their cases, and to whom the judges may refer on points of practice; and these conditions appear to be best fulfilled by the retention of an officer in the position of the clerk of assize. This, however, leads us to the consideration whether for the proper discharge of the duties of that office it is, or is not, necessary that the clerk of assize, prior to his appointment, should have had a professional training. The opinions which we elicited from those who attended before us differed on this point; but the general concurrence of testimony appeared to lead to the conclusion that, even if it was not essential that a clerk of assize should have been a practising barrister or attorney before his appointment, he would be in a far better position to discharge the duties if he had possessed the advantages of a legal training, than if he came quite new to the work and had to rely upon his officers for information on every point of practice.

"We are of opinion, therefore, that it would be expedient to prescribe that persons hereafter appointed to these offices should have had some degree of legal training, i.e. that he should be a barrister or certificated attorney of, say, three years' standing, or should have served prior to his appointment for a similar period in one of the subordinate offices above mentioned on circuit, and that a Bill should be introduced in the House of Commons to effect this object.

"Having thus stated it as our opinion that it will be desirable to retain the office of clerk of assize, we come to the consideration whether the remuneration now assigned to that office on the principal circuits is not more than is adequate to secure the services of competent and sufficiently trained officers. It was stated in the earlier part of this report that the circuits did not, on an average, last for more than from three to four months in a year, and probably, as a rule, they do not greatly exceed the first-named period. The clerk of assize is, therefore, not called upon to devote his entire time to the duties of his office for more than about a fourth of the year, and for the remaining nine months he is at liberty to pursue other avocations. It is true that some one must be in attendance at the office in London on every day in the year; and if the clerk of assize occupies chambers for his private business, which he also makes the circuit office, he can, if he chooses, be in constant attendance there himself, but he is under no obligation to do so, as the presence of one of his officers would be all that was necessary for the business. If a barrister, he is not precluded from private practice except on his own circuit; but as the assizes throughout England are held at the same period, it is probable that he may not often have the opportunity of holding briefs on another circuit. He can, however, take business at his own chambers, and this, we understand, is done by some clerks of assize. Again, though we have thought it our duty to recommend that some degree of professional knowledge should be required of persons hereafter appointed to these offices, it does not seem necessary that the standard of qualification should be placed at

such a point as would be essential in the case of offices involving duties of a judicial character.

"Having regard to these considerations, and especially adverting to the salaries paid to persons holding offices of greater importance, and upon whose time much larger demands are made than is the case with the clerks of assize; finding, moreover, as before stated, that the first proposal of the Treasury, when the settlement was made in 1856, was to fix the salary at 800*l.*, we consider that a salary of 1000*l.* per annum is more than is sufficient to secure the services of officers properly qualified to fill these posts. We have not overlooked the fact that out of his salary a clerk of assize is called upon to meet certain expenses. He has to find an office, and to defray the cost of stationery, copying, postages, &c. We understand that these expenses, as a rule, average about 100*l.* a year, though on the Midland circuit they are higher, owing to the length of the assizes and number of cases at York and Leeds. It was stated to us, however, that in the New Courts of Justice it is intended to provide offices for the clerks of assize, and if this be the case they will hereafter be relieved of the charge for the rent, which constitutes the largest portion of their expenses.

"We have also reason to believe that there was no sufficient ground for assigning to the clerk of assize a higher sum per night for travelling and subsistence than to his officers. It does not appear that he is called upon to incur greater charges than they do; and they occasionally live together on circuit, and bear the expenses in equal proportions.

"He is thus a gainer to the extent of about 12*s.* a night; and this profit, we were informed, was regarded as having been intended to meet the expense of an office.

"Whether this be so or not, we should recommend that the allowance should in future be the same to the clerk of assize and his officers.

"We have now to recommend that the salaries of the clerks of assize on the Home, Western, Oxford, Midland, and Norfolk circuits should, as vacancies occur, be reduced to a sum not exceeding 800*l.* per annum. As regards the Northern circuit, we have no hesitation in stating that if the duties of the clerk of assize remain, as at present, limited to the counties of Northumberland, Cumberland and Westmoreland, a sum of 500*l.* per annum would, in our opinion, afford a sufficient remuneration. We do not see any reason for an alteration in the salaries of 500*l.* per annum each, now received by the clerks of assize on the two Welsh circuits.

"As the salary of the office of clerk of assize can now only be revised upon a vacancy, and with the sanction of the three chief judges, it will probably be thought fitting to notify to the chief judges the proposals herein contained for any observations they may think fit to offer before proceeding to legislate on the subject.

"The foregoing proposals are based on the assumption that the circuits remain as they now are; but in the event of any addition to the number of counties now attached to a particular circuit under the

powers conferred by the Act of 26 & 27 Vict., c. 122, involving a large increase of the duties of the clerk of assize, power may be reserved to the Treasury to assign such additional salary as may be reasonable and proper in consequence of such alteration.

"We would further propose that the additional salary of 100*l.* a year, which the clerk of assize can now assign to one of his officers whom he may select to act as his deputy, should be discontinued on the death or resignation of the officers at present receiving these extra allowances. We are of opinion that the power thus placed in the hands of a clerk of assize to remunerate one of his officers more highly than the others might be exercised with partiality, and that it has a tendency to diminish that responsibility which rightly belongs to his office, and to induce him to delegate to others duties properly devolving upon himself.

"We would state, in conclusion, that although the county palatine of Lancaster was not strictly embraced in the terms of the inquiry committed to us, we thought it desirable to request the attendance of the clerk of the Crown for that county, who performs duties analogous to those of a clerk of assize in the Crown Court, but who has a distinct jurisdiction from, and whose office is regulated by, a different Statute from that applying to clerks of assize. The Act of 19 & 20 Vict., c. 118, extended and made applicable to this officer the powers conferred by 18 & 19 Vict., c. 126, for the payment of clerks of assize by salary in lieu of fees, and the Treasury, in the exercise of these powers, assigned to the present clerk of the Crown a salary of 989*l.* 15*s.*, being the full amount of his net yearly emoluments from fees prior to the passing of the Act. Out of this amount the clerk of the Crown continues to pay his officers, who are understood to be clerks employed in his private office, as he did before he was placed upon salary. Whenever a vacancy occurs in the office, it will be for the Treasury to reconsider the question of salary, and to decide whether a staff of officers, similar to those employed on other circuits, and paid out of public funds, should be assigned to the clerk of the Crown. If this be conceded, having regard to the fact that the duties of the clerk of the Crown are confined to the Criminal Court, and that he has no duties at Nisi Prius, we think that a salary less in amount than that which we have proposed for the clerks of assize would be found sufficient for this officer."

In accordance with the above report, a Bill was introduced into the House of Commons with a view of carrying out its recommendations, and passed into law. The Act declares that a person shall not be appointed to be clerk of assize unless he has during a period of not less than three years been either (1) a Barrister-at-Law in actual practice, or (2) a special pleader or conveyancer in actual practice, or (3) an Attorney of one of the Superior Courts of Law at Westminster in actual practice, or (4) a subordinate officer of a clerk of assize on circuit; and the appointment of any person to be clerk of assize who is not qualified as provided by this section shall be void, and another duly qualified person may be appointed in his place, as if he were naturally dead. Whenever any vacancy takes place in the office of

clerk of assize, the Commissioners of her Majesty's Treasury may revise the salary attached to such office and fix another salary, having regard to the nature of the duties and responsibility of such office. A clerk of assize who is paid by salary shall not take any fee for his own use; and if he is authorized by any Act passed or hereafter to be passed to take any fee, he is to account for and pay over such fee as may be directed by the Commissioners of Her Majesty's Treasury. Every person appointed after the passing of this Act to be clerk of assize shall hold his office subject to such provisions and regulations as may thereafter be enacted by Parliament, and shall not be entitled to any compensation in respect of the emoluments of his office in case any alteration is made in the duties, or in case it is abolished by Parliament. Any person employed as clerk of assize shall not be removed from his office or employment without the sanction of the Commissioners of Her Majesty's Treasury.

LORD JUSTICE SELWYN.

THE late Right Hon. Sir Charles Jasper Selwyn, one of the Lords Justices of Appeal in Chancery, whose death occurred at his residence, Pagoda House, Richmond, Surrey, on the 10th of August, was the youngest son of the late Mr. William Selwyn, Q.C. (who died in 1855), by Lætitia Frances, daughter of the late Thomas Kynaston, Esq., of Witham, Essex, and brother of the Bishop of Lichfield and of Canon Selwyn. He was born at Richmond in October, 1813, and was therefore at the time of his decease in the fifty-sixth year of his age; he was educated at Eton, and at Trinity College, Cambridge, of which he was successively Scholar and Fellow, and where he graduated B.A. in 1836, and proceeded M.A. in 1839; and although, owing to a domestic affliction, he was prevented from aiming at "honours," he nevertheless displayed considerable classical genius, and thrice carried off the College prizes, given every year for the best composition in Latin verse. In 1840 he was called to the Bar at Lincoln's Inn, and at once entered into practice at the Equity Bar, and in 1855, the office of commissary to the University being vacant, Mr. Selwyn was appointed to the post by Lord Lyndhurst, in obedience to the expressed wish of the late Prince Consort that a member of the University should be chosen. In the following year he received a silk gown, and was made a Bencher of his Inn. He entered Parliament in April, 1859, when in conjunction with the Right Hon. S. H. Walpole, he was returned as M.P. for Cambridge University; he sat for that distinguished constituency until 1868, when, having held for a few months the post of Solicitor-General, he was appointed by the Right Hon. Mr. Disraeli to a vacant Lord Justiceship of Appeal, and was sworn a member of the Privy Council. The late judge, who was a magistrate and deputy-lieutenant for Surrey, was twice married, first, in 1856, to Hester, fifth daughter of the late J. G. Ravenshaw, Esq. (formerly Chairman of the East India Company), and widow of Thomas Dowler, Esq., M.D. His second wife, who survives him, and to whom

he was only married a few months ago, is Catherine Rosalie, daughter of Col. Godfrey T. Greene, C.B., and widow of the Rev. Harry Dupuis, vicar of Richmond. By his first marriage he has left a son and two daughters. Judge Selwyn was buried at Nunhead Cemetery.—*Law Times*.

#### LORD MACKENZIE.

LORD MACKENZIE, lately one of the senators of the College of Justice, died at his residence in the suburbs of Edinburgh on the 29th of September. His lordship was the son of Mr. George Mackenzie, a tradesman of Perth, and was born in 1807; retired from the bench about five years ago, and for two or three years back has been in delicate, and latterly in very feeble, health. He was educated chiefly at St. Andrew's University, finishing his studies at Edinburgh, where he became a member of the Faculty of Advocates in 1832. He was appointed in 1851 Sheriff of Ross-shire, and in 1854 he was appointed Solicitor-General under Lord Aberdeen's Government, but only held that office for a few weeks, having been elevated to the bench as successor to Lord Robertson. His lordship resigned his seat on the bench in 1864. In 1862 he published a work on the Roman Law, which has reached a second edition.

#### LORD MANOR.

ON the 7th of October, Lord Manor, one of the judges of the Court of Session in Scotland, was found dead in bed in his house in Charlotte Square, Edinburgh. The deceased judge was the son of James Dundas, Esq., of Ochertyre, and was born in Edinburgh in 1802. At Exeter College, Oxford, Mr. Dundas studied for some time, and in 1826 he became a member of the Faculty of Advocates of the Scotch Bar. In 1845 he was appointed Sheriff of Selkirkshire, and in 1853 elected to the office of Vice-Dean of Faculty, an office he held for fifteen years. In 1868 he succeeded Lord Curriehill as Judge of the Court of Session and assumed the title of Lord Manor. He married a sister, whom he survived, of the late Bishop Mackenzie, who died whilst on a missionary expedition in Central Africa. By this lady he had a large family, most of whom are now living.

#### LORD GLENALMOND.

THE body of the Right Hon. George Patton, Lord Justice Clerk of Scotland, who so mysteriously disappeared on the 20th of September from his house at Glenalmond, Perthshire, was discovered on the 24th ult., at the Spout of Buchanty, with his throat cut, leaving little doubt that he died by his own hand. The deceased judge was the son of the late James Patton, Esq., of Glenalmond (who was Sheriff Clerk of Perthshire), by Anne, daughter of the late Thomas Marshall. He was born at Perth, in the year 1803, and received his early education at the Perth Academy, whence he proceeded to the University of Edinburgh, and afterwards to Trinity College,

Cambridge, where he graduated B.A., having gained an English declamation prize. He was admitted an Advocate at the Scotch Bar in 1828, being contemporary with Lord Deas, one of the judges of the Court of Session, who became a member of the Faculty of Advocates in the same year. In 1859 Mr. Patton was appointed Solicitor-General for Scotland, under Lord Derby's government, in succession to Mr. Mure, who became Lord Advocate. Mr. Patton only filled the position of Solicitor-General for a few months, Lord Derby having retired from office in June, 1859. In the early part of 1866, Mr. Patton secured a seat in Parliament for the English borough of Bridgwater, and on the formation of Lord Derby's third administration, in June of that year, he was selected to fill the post of Lord Advocate for Scotland. On accepting office he had to undergo the ordeal of re-election, but was defeated on this occasion. He continued however to hold the office of Lord Advocate, but without a seat in the House of Commons till February, 1867, when on the retirement of Lord Colonsay from the Scotch Bench, Mr. Patton was nominated Lord Justice Clerk in succession to Mr. Inglis, who thereupon became President of the Court of Session. On Mr. Patton's elevation to the bench he was sworn a member of the Privy Council, and assumed the courtesy title of Lord Glenalmond, from his seat in Perthshire. The deceased judge married, in 1857, Margaret, daughter of General Alexander Betheme, of Blebo, Fifeshire.—*Solicitor's Journal.*

THE RIGHT HON. JOHN EDWARD WALSH.

THE late Irish Master of the Rolls was the son of the Rev. Dr. Walsh, Rector of Finglas, in the county of Dublin, and was educated in the University of Dublin. His college career was unusually distinguished. He obtained a classical scholarship, the first gold medal in ethics and topics, and was also auditor of the Historical Society—an honour which was recently attained by his eldest son. He was called to the Bar in 1839, and joined the Leinster Circuit. Like many other eminent lawyers who have entered the profession without the advantages of professional connexion, he was for some years without practice. In 1845 he published, in conjunction with Mr. Nunn, a valuable work entitled "The Irish Justice of the Peace," which continued to be the text-book in that branch of the law, until it was rendered obsolete by recent legislation. We find his name in the volumes of the "Irish Equity Reports," from 1843 to 1852, as a contributor of reports of cases in the Court of Chancery. In 1857 Mr. Walsh was called to the Inner Bar, and at once took a leading position, both on his circuit and at the Chancery Bar. In 1859 he was appointed a Crown Prosecutor at Green Street by the present Chief Justice, then Attorney-General; an office which he held until he was appointed Attorney-General in 1866, and became himself the patron of the office which he vacated. On the accession of Lord Derby's Ministry to power in 1866, and the elevation to the Bench of their former Law Officers, Mr. Walsh was admittedly the foremost

member of the Conservative party at the Irish Bar. His distinguished University career, the reputation which he had achieved in his profession, and the consistency with which he had maintained his political opinions, recommended him to the confidence of the electors of the University of Dublin, who had just lost the services of Mr. Whiteside. Mr. Walsh was returned without opposition, and took his seat in the House of Commons ; but his Parliamentary career was short. The dissolution of Parliament followed close upon his election, and before the Long Vacation was over Mr. Walsh had become Master of the Rolls. He proved himself a worthy occupant of a seat which has been filled by such distinguished predecessors as Curran, O'Loughlen, Blackburne, and Smith. Before no other judge did the advocate of a righteous cause appear with greater confidence, and we may add, with greater pleasure. In conducting the routine business of his Court, the hearing of motions and summary petitions, the late Master attained the golden mean between laxity and obstructiveness.—*Irish Law Times*.

GEORGE COODE, Esq.

THIS gentleman lately died at Walmer, near Deal, Kent. He was by profession a barrister-at-law and Parliamentary draftsman, but for many years he had been employed in official and special capacities, in which he showed abilities of a very high and varied kind, evidences of which may be found in the "Report of Local Taxation and Digest of the Laws relating to twenty-four Local Taxes;" in his "Treatise on Legislative Expression;" in his "Report on the Law of Settlement;" in his "Papers on the Consolidation of the Law;" in his "Report of the Fire Insurance Duties;" in his "Memorandum on the Application of Limited Liability in Joint Stock Banks;" in his article on the Income Tax in the *Edinburgh Review*; in his work on the National Debt; as well as in sundry articles in the *Jurist*, and the *Law Review* and other papers. Throughout his employments in the Poor Law Commissions from 1834 to 1848, as assistant secretary, during which he had the legal conduct of the business of the Commissions, and in his subsequent special employment in various commissions and occasional public inquiries and services, his logical aptitude and mastery of practical affairs were much appreciated by the eminent public men who were engaged with him on those occasions.

THE SOCIAL SCIENCE CONGRESS.

THE Thirteenth Annual Congress was held at Bristol, on the 29th of September, under the presidency of the Right Hon. Sir Stafford Northcote, Bart., M.P., who delivered his inaugural address on the evening of that day. On the following day Mr. G. W. Hastings, President of the Jurisprudence Department, delivered his address on the Amendment of the Law. He said that among the branches of moral and economical science which the Association pursues, jurisprudence justly occupies the first place, inasmuch as all the leading

subjects with which the other branches deal must ultimately find their expression in law. All the various questions grouped under the head of Social Economy are all continually adding to the Statute Book. Legislation in a free country is the expression of the popular will, and the more completely it is so, the more safe and beneficial will it be. The impulse of a nation, unless in its most evanescent moods, is to work in accordance with the necessities of the age; and though the impulse may be blind or unconscious, it is not the less unerring in its aim, for the necessities out of which it springs are the silent enduring forces of nature, constant in their operations. These social forces are at work in every nation, at all periods of its history, disintegrating the old, and building up the new; and it is the province of Social Science to investigate the origin and nature of the motive powers which thus act upon society. It has also a more practical work to do in adjusting the machinery of society, so that it may move in harmony with the great necessities that impel its progress, with the wants and aspirations of the people; and this adjustment can be effected only by the instrumentality of law. The whole material universe is self-regulated; but when we come to man we find a change. The free will has opened the flood-gates of evil as well as the infinite possibilities of good. Human society has to win its way through toil, privation, and disease; and the manifold evils, that grow with the good fruits of man's companionship, have to be repressed or regulated by the strong arm of the law. The question of how to adjust the machine of society to the inexorable necessities of its existence is the great problem to be solved by the law. The object of the criminal law is to reduce crime to the minimum point, and thus provide the highest security for life, property, and honest toil; but the intention, however excellent, must fail in its execution if either the law or its administration is ill-adapted to its purpose. The evils that exist are the result of a want of scientific investigation, and could be wholly eradicated by a proper adjustment of means to the end required. In civil procedure, too, if the process be complicated and costly, if the courts be distant and intermittent, if the law's delay breaks down the weary litigant, the object of legislation is lost. Judicial science is, therefore, needed to prevent procedure from failing of its end. When the question, "What is the law?" is answered by pointing to hundreds of volumes teeming with thousands of decisions, with one-third of which no living lawyer is acquainted, is it not a mockery to speak of the law as an exposition of rights and duties to the people? Yet that mass of chaotic fluidity could be moulded under the hand of science into a compact and luminous code, the reflection of the national spirit and the object of willing reverence to its justice and wisdom. Looking back to the past twelve months, the members of the Association had every reason to congratulate themselves on the results attained. The Evidence Bill had, with slight alterations, passed into law, and so far as civil procedure is concerned, the parties to every suit are admissible as evidence. The Married Women's Property Bill was successfully conducted



through the House of Commons, and its principle was admitted by the House of Lords. It was satisfactory to know that the Bankruptcy Act of last session had both vindicated the principles and followed the example of the Association. The advice of the Association had been followed with good effects in the regulation of convict prisons and the treatment of habitual criminals; and it was to be hoped that the county gaols in Ireland, and also in India, would be better managed. The representations of the Association had been received with great kindness by the late Secretary for India, now President of the Association, and by the present Governor-General. The legislation on the licensing of beerhouses had aroused a hope that great good would result from it. The appointment of a public prosecutor was a growing necessity of our times, and the intervention of such an officer was much needed. But the great need of the age was a codification of our national jurisprudence. Instead of a cumbrous body of much occupied dignitaries, a small commission of three of the judges could perform the work in a reasonable time.

The first question in the International and Municipal Law Section of the Jurisprudence Department—What ought to be the legal and constitutional relations between the United Kingdom and the Colonies?—on which Mr. J. E. Gorst, Mr. Thomas Hare, Mr. John Noble, Mr. Labilliere, and others had papers, was ably discussed by a number of speakers, among whom both imperial and colonial interests were fairly represented. While a strong feeling was expressed in favour of the permanent maintenance of the integrity of the whole empire, it was admitted that the present relations between the mother country and her dependencies were not altogether satisfactory. It was particularly pointed out that the colonies have no adequate facilities for access to the councils of the Imperial Government, and a preponderance of opinion was manifested in favour of the creation of a council to assist the Secretary of State for the Colonies, on the same footing as the Council now attached to the India Office, the members of this Colonial Council to be elected by the various colonies of the empire. A suggestion for the abolition of appeals to the Judicial Committee of Privy Council was decidedly negatived, it being felt that for securing the unity of law throughout the empire a supreme metropolitan court of appeal ought to be maintained.

The discussion on the second special question—What Limits ought to be placed by law on Charitable Endowments?—on which Mr. Lewis Fry and Mr. Hare had papers, while it produced a diversity of opinion as to the policy of encouraging charitable bequests or gifts, resulted in a general concurrence as to the necessity for a constant revision of charitable endowments by public interference, to meet the changing requirements of successive generations, and to prevent the misuse of the form of perpetual disposition, which, as it is wholly the offspring of State authority, should be strictly subjected to State control.

The question—What ought to be the principles regulating the Ownership and Occupation of Land?—led to the conclusion that the

duration of charges upon land and the period of prescriptive title ought to be considerably shortened, and that the pending Irish land difficulty would best be solved by securing to the tenant full compensation for improvements to the land at the termination of the tenancy, through the agency of a public tribunal, the Civil Bill Court being recommended for that purpose. Mr. Frederic Hill, Mr. Serjeant Cox, and Mr. W. D. Henderson read papers on this subject.

A discussion on the provisions of the Married Women's Property Bill showed that the great preponderance of opinion is now, as it was last year, in favour of that measure, and the necessity for maintaining the leading principle of the Bill—that marriage shall not operate as an absolute transfer of the wife's personal property to the husband—was strongly affirmed.

The principles and administration of the Patent Law were fully and ably discussed. A general conviction was expressed to the effect that an alteration of the law cannot be long delayed.

In the Reformatory Section, under the able chairmanship of Sir J. Eardley Wilmot, Bart., the question of the working of the Reformatory and Industrial Schools was discussed. Many members spoke, and the general opinion was that the Acts had been signally beneficial. The section was of opinion that the Habitual Criminals Act of last session was not sufficiently comprehensive to have a due effect on the repression of professional crime. The subject of Infanticide was discussed. A paper by Dr. Lankester, F.R.S., recommended the abolition of capital punishment in cases of Infanticide, and the registration of still-born children; while Mr. A. H. Safford was in favour of infant homes, with power for the managers to proceed before a magistrate against both parents for contributions, and for the registration of such children put out. The appointment of a Public Prosecutor was also discussed in this section, papers on the subject having been read by Mr. Serjeant Pulling and Mr. Henry Miller, of Glasgow. On the subject of Prison Labour the section expressed a strong opinion that in all gaols it should be more productive and uniform.

#### THE CONDUCT OF PUBLIC BUSINESS IN PARLIAMENT.

THE Select Committee appointed to join with the Select Committee appointed by the House of Lords, to consider whether facilities can be given for the despatch of business in Parliament, especially in regard to the relations of the two Houses, have considered the matters to them referred, and have agreed to a report:—

The following are the resolutions agreed to by the Committee:—

“1. That it is expedient that opposed private Bills should be referred to a joint committee composed of members of both Houses.

“2. That the House of Commons should not insist on its privileges in regard to local rates in the case of private Bills, or in the cases of public Bills confirming provisional orders.

“3. That the Chairman of Committees in the House of Lords and the Chairman of Ways and Means in the House of Commons should confer at the commencement of every session, as at present, and

determine in which House the respective Bills should be first considered.

"4. That all petitions against a private Bill should be deposited in both Houses within fourteen days after the first reading of the Bill in the House in which it commences.

"5. That a joint standing orders committee of Lords and Commons should be appointed at the commencement of every session, with power on each occasion of meeting to appoint a chairman.

"6. That each House shall appoint a committee of selection, consisting of five members. That each committee of selection should have power to confer with the corresponding committee of the House, and should appoint members from its own House to sit jointly with any committee of the other House on opposed private Bills.

"7. That the joint committees on opposed private Bills should consist of three members of each House.

"8. That one of the members of the committee of the House to which the Bill belongs, to be named by the committee of selection of such House, should be chairman of the joint committee.

"9. That all members of such committees, including the chairman, should vote, and if the votes are equally divided, that the question should be negatived.

"10. That the committee should report the Bill to that House by which it was referred, and that a copy of such report should be deposited in the Private Bill Office of the other House.

"11. That the Bill, on being reported, should pass through its customary stages, as heretofore, in that House in which it originated; and should be open to amendments, and to recommitment. That in case of recommitment, the Bill should be referred to the former or to some other joint committee, as may be expedient.

"12. That when a private Bill has been passed through its several stages and sent to the other House, it should be treated in the latter House as an unopposed Bill; unless, in any special case, the House should order it to be recommitted. That the Bill, in such a case, should be referred to the former or to some other joint committee, as may be expedient.

"13. That unopposed Bills continue to be treated according to the existing standing orders of both Houses.

"14. That a joint committee of referees on *locus standi* should be appointed, with power to frame general rules in regard to the right of petitioners to be heard against private Bills, such rules to be laid upon the tables of both Houses.

"15. That the joint committee of referees should consist of the Chairman of the Lords' Committees, one other member of the House of Lords to be appointed by that House, the Chairman of Ways and Means, one other member of the House of Commons to be appointed by the Speaker, and the counsel to the Chairman of Committees and the Speaker's counsel as official referees; three to form a quorum, with power on each occasion of meeting to appoint a chairman.

"16. That all questions relating to the *locus standi* of petitioners

against Bills belonging to either House should be heard and determined by such committee of referees, without prejudice, however, to the power of the joint committee to which any Bill is referred to decide upon any such question arising incidentally in the course of their proceedings.

"17. That all members of the committee of referees, including the chairman, should vote, and if the votes are equally divided, that the question should be negatived."

And the Committee have directed the minutes of evidence taken before them, together with an appendix, to be reported to both Houses.

#### THE LAWYERS IN GERMANY.

A "Lawyers' Congress," attended by some of the most eminent jurists in Germany, was held recently at Heidelberg, and passed several resolutions on important social and judicial questions. Among these were the following:—1. "Civil marriages should be recognised as a necessary principle of the relations between Church and State in the whole of Germany; and the State should make no objection to the marriage of persons of different religions." This was proposed by Dr. Gneist, and passed against a minority of one only. 2. "That government sanction should not be required for the formation of joint-stock companies or other associations, but that the liability of each member of such company should be unlimited." 3. "A written document, acknowledging a debt, should be taken as sufficient proof of such debt, independently of the circumstances under which the debt was incurred." 4. "As nearly all the objects of punishment are more effectually obtained by solitary confinement than by any other system of imprisonment, such confinement should be recognised by law as the regulated mode of executing sentences which involve the loss of liberty; exceptions to this rule might be made when necessary, either by the judge or governor of the prison." This resolution was passed almost unanimously.

---

#### BAR STUDENTS' LECTURES.

THE Public Lectures on Constitutional Law and Legal History, at Lincoln's-inn Hall, on Wednesdays, at 2 p.m.; the first lecture on 10th November. The Private Classes on Tuesdays, Thursdays, and Saturdays, at 10 a.m.; first class meets on the 11th November.

The Public Lectures on Equity, at Lincoln's-inn Hall, on Thursdays (Elementary Lecture at 2 p.m.; Advanced Lecture at 3 p.m.); the first lecture on the 11th November. The Private Classes on Mondays, at 3.45 and 4.30 p.m.; Wednesdays and Fridays, at 3.15 and 4.15 p.m.; first class meets on the 12th November.

The Public Lectures on the Law of Real Property, &c., at Gray's-inn Hall, on Tuesdays (Elementary Lecture at 2 p.m.; Advanced Lecture at 3 p.m.); the first lecture on the 9th November. The Private Classes on Mondays, Wednesdays, and Fridays, at 11.45 a.m. and 12.45 p.m.; first class meets on the 10th November.

The Public Lectures on Jurisprudence, Civil and International Law, at the Middle Temple Hall, on Fridays, at 2 p.m.; the first lecture on the 12th November. The Private Classes on Tuesdays and Thursdays, at 3.45 p.m.; Saturdays, at 3.45 p.m.; first class meets on the 13th November.

The Public Lectures on the Common Law, at the Inner Temple Hall, on Mondays (Elementary Lecture at 2 p.m.; Advanced Lecture at 3 p.m.); the first lecture on the 15th November. The Private Classes on Tuesdays, Thursdays, and Saturdays, at 11.45 a.m. and 12.45 p.m.; first class meets on the 16th November.

The Public Lectures on Hindu, Mahomedan Law, and the Laws of India, at the Middle Temple Hall on Saturdays, at 11 a.m. The Private Classes on Mondays, Wednesdays, and Fridays, at 10 a.m.

The Educational Term commences on the 1st November, and ends on the 22nd December.

The First Public Lecture of this course will be delivered by the Reader on the Law of Real Property on the 9th November, at 2 p.m.

The First Meeting of each Private Class will take place on the usual Morning or Evening of meeting after the First Public Lecture on the same subject.

Students who have been unable to attend a Lecture or class of either of their Readers, and desire dispensation as a qualification for call to the Bar, should make application, with an explanation of the cause of such absence, in writing, to the Reader during the course, or immediately after the delivery of the last Public Lecture of the course; and the Reader's report thereon, together with the application, will be forwarded to the Council of Legal Education, who alone have the power of granting dispensation.

The Council have resolved that in no case shall Students be allowed to change from the Elementary to the Advanced Courses of Lectures and Classes, or *vice versa*, while qualifying for call to the Bar, or for the Examinations on the subjects of the Lectures and Classes.

---

### INCORPORATED LAW SOCIETY.

*Trinity Term, 1869.*

At the final examination of candidates for admission on the roll of attorneys and solicitors of the Superior Courts, the examiners recommended the following gentlemen, under the age of 26, as being entitled to honorary distinction:—William Warburton, Thomas Mortimer Siddall, William John Battishill, B.A., Charles James Burrill, William Cockcroft, Edward Thomas Moore, Richard Petch.

The Council of the Incorporated Law Society have accordingly awarded the following prizes of books:—To Mr. Warburton, the prize of the Honourable Society of Clifford's Inn. To Mr. Siddall, the prize of the Honourable Society of New Inn. To Mr. Battishill, Mr. Burrill, Mr. Cockcroft, Mr. Moore, and Mr. Petch, prizes of the Incorporated Law Society.

The examiners also certified that the following candidates, under the age of 26, whose names are placed in alphabetical order, passed examinations which entitle them to commendation :—William Henry Crowder, Thomas Parry Jones, Lewis Chalmers Lockhart, James Ryley, Edward Lee Warner, Warner Wright.

The Council have accordingly awarded them certificates of merit.

The examiners further announced to the following candidates that their answers to the questions at the examination were highly satisfactory, and would have entitled them to certificates of merit if they had not been above the age of 26 :—Frank Crisp, Edwin Cotterill Newey, Edmund Warriner.

The number of candidates examined in this Term was 178 ; of these, 149 passed, and 29 were postponed.

---

#### APPOINTMENTS.

THE Queen has been pleased to appoint the Right Hon. the Lord Chancellor, the Right Hon. Baron Cairns, the Right Hon. Baron Penzance, the Right Hon. Sir William Erle, Knt., the Right Hon. Sir Robert Joseph Phillimore, Knt., D.C.L., the Right Hon. George Ward Hunt, the Right Hon. Hugh Culling Eardley Childers, Sir William Milbourne James, Knt., Sir George Wilshere Bramwell, Knt., Sir Colin Blackburn, Knt., Sir James Shaw Willes, Knt., Sir Montague Edward Smith, Knt., Sir Robert Porrett Collier, Knt., Attorney-General, Sir John Duke Coleridge, Knt., Solicitor-General ; Sir Roundell Palmer, Knt., Q.C., Sir John Burgess Karslake, Knt., Q.C., John Richard Quain, Esq., Q.C., Charles Shapland Whitmore, Esq., Q.C., Henry Cadogan Rothery, Esq., Acton Smee Ayrton, Esq., George Moffatt, Esq., William Grandy Bateson, Esq., John Hollams, Esq., and Francis Dobson Lowndes, Esq., to be Her Majesty's Commissioners to make inquiry into the operation and effect of the present constitution of the High Court of Chancery of England, the Superior Courts of Common Law at Westminster, the Central Criminal Court, the High Court of Admiralty of England, the Admiralty Court of the Cinque Ports, the Courts of Probate and of Divorce for England, the Courts of the Counties Palatine of Lancaster and of Durham, the County Courts, the Courts of Quarter Sessions and all other the inferior and local Courts, both civil and criminal, in England and Wales, and the Courts of Error and of Appeal from all the said several Courts ; and into the operation and effect of the present separation and division of jurisdiction between the said several Courts, and also into the operation and effect of the present arrangements for holding the sittings in London and Middlesex, and the holding of sittings, assizes, and sessions respectively in England and Wales ; and of the present division of the legal year into terms and vacations ; and generally into the operation and effect of the existing laws and arrangements for distributing and transacting the judicial business of the said Courts respectively, as well in Court as in Chambers, with a view to ascertain whether any

and what changes and improvements, either by uniting and consolidating the said Courts, or any of them, or by extending or altering the several jurisdictions, or assigning any matters or causes now within their respective cognisance to any other jurisdiction, or by altering the number of judges in the said Courts, or any of them, or empowering one or more judges in any of the said Courts to transact any kind of business now transacted by a greater number, or by altering the mode in which the business of the said Courts, or any of them, or of the sittings, assizes, and sessions, is now distributed or conducted, or otherwise, may be advantageously made, so as to provide for the more speedy, economical, and satisfactory despatch of the judicial business now transacted by the same Courts, and at the sittings, assizes, and sessions respectively; and also to make inquiry into the laws relating to juries, especially with reference to the qualification, summoning, nominating, and enforcing the attendance of jurors, with a view to the better, more regular, and more efficient conduct of trials by jury, and the attendance of jurors at such trials; and further to make inquiry as to the duties of the several officers, clerks, and other persons of or connected with the said Courts, or any of them, their salaries, fees, and emoluments, with a view to ascertain whether any, and, if any, what alterations may advantageously be made therein.

The Right Hon. Edward Pleydell Bouverie, Barrister-at-Law, has been appointed one of the Ecclesiastical Commissioners for England.

The Right Hon. Lord Lyttelton, K.C.M.G., Arthur Hobhouse, Esq., Q.C., and the Rev. Hugh George Robinson, M.A., have been appointed Commissioners for the purposes of "The Endowed Schools Act, Act 1869," and Henry John Roby, Esq., M.A., has been appointed Secretary to the Commissioners.

Mr. Alfred Austin, Barrister-at-Law, late Secretary to the Commissioners of Her Majesty's Works and Public Buildings, has been gazetted a Companion of the Civil Division of the Order of the Bath.

The Queen has conferred the honour of knighthood on Mr. Thomas Duffus Hardy, Deputy Keeper of the Public Records, Mr. Sydney Smith Bell, Chief Justice of the Supreme Court of the Cape Colony, Mr. James Cockle, Chief Justice of the Supreme Court of the Colony of Queensland, Mr. R. D. Hanson, late Chief Justice of the Colony of South Australia, and Mr. R. J. Heron, Town Clerk of Manchester.

Mr. Felix Bedingfield, late Colonial Secretary of the Island of Mauritius; Mr. John Bayley Darvall, late Attorney-General of the Colony of New South Wales, and Mr. John Sealy, Attorney-General of the Island of Barbadoes, have been appointed Commanders of the Order of St. Michael and St. George.

Mr. James Fallon, Barrister-at-Law, of Cheltenham, has been appointed Recorder of the Borough of Tewkesbury, in the room of Mr. A. W. Daniel, who has resigned owing to ill-health, and Mr. W. Norton Lawson, Barrister-at-Law, has been appointed Recorder

for the Borough of Richmond, in Yorkshire, in the place of Mr. Vernon Lushington, Q.C.; who has resigned in consequence of having accepted the Secretaryship of the Admiralty.

Mr. W. H. Higgin, Q.C., has been elected to the chairmanship of the Salford Hundred Sessions, in the room of Mr. Alfred Milne, resigned.

Sir William Mantle has been appointed stipendiary magistrate for the Manchester division, rendered vacant by the death of Mr. H. L. Trafford.

Mr. Duncan Stewart, of Lincoln's Inn, Barrister-at-Law, has been appointed by the Lord Chancellor to act as Registrar in the Court of Bankruptcy, London, during the absence of Mr. Registrar Keene, from ill-health.

Mr. J. C. O'Dowd, barrister-at-law, has been appointed to the office of Deputy Judge Advocate General of the Forces in the place of Mr. Vernon Lushington, Q.C., now Secretary to the Board of Admiralty.

At a Session of Council of the University College, London, the following appointments have been made:—Mr. Sheldon Amos, M.A., of the Inner Temple, to be Professor of Jurisprudence; Mr. William Alexander Hunter, M.A., of the Middle Temple, to be professor of Roman Law; Mr. J. W. Willis Bund, M.A., LL.B., of Lincoln's Inn, to be Professor of Constitutional Law and History; Professor J. E. Cairnes, M.A., and Professor T. E. Cliffe Leslie, LL.B., to be Examiners for the Ricardo Scholarship in Political Economy.

The following gentlemen have been appointed revising barristers for the Metropolitan District for the present year: Mr. I. N. Goren, of the Inner Temple, for the County of Middlesex; Mr. Spencer Percival, of Lincoln's Inn, for the City of London; Mr. F. I. Bacon, of Lincoln's Inn, for Westminster, Marylebone, Finsbury, and the Tower Hamlets, and Mr. N. I. Senior, of Lincoln's Inn, for Hackney and Chelsea. Mr. G. Francis and Mr. J. Philips have been appointed additional revising barristers for Kent, and Mr. R. Williams additional revising barrister for Surrey. The following gentlemen have been appointed assistant revising barristers:—Mr. W. R. Cole, Mr. D. Maclachlan, Mr. R. H. Lawrie, Mr. I. H. Hodgson, Mr. E. Macrory, Mr. W. R. MacConnell, Mr. W. H. Butler, Mr. G. Bruce, Mr. W. I. Bacon, Mr. H. F. Blair, Mr. I. R. Mellor, Mr. Walter B. Trevelyan, and Mr. Harrison Falkner Blair.

Mr. C. Lovell Lovell, Barrister-at-Law, has been appointed by Lord Penzance to be Registrar of the Court of Probate at Wells, in the place of Mr. J. J. Rocke, Solicitor, deceased.

The City Sheriffs for the ensuing year—Alderman Causton and Mr. Vallentin—have been sworn into office. Mr. A. J. Baylis, Church Court, Old Jewry, is Under-Sheriff for Alderman Causton; Mr. James Crosley, Birchin-lane, is Under-Sheriff for Mr. Vallentin.

Mr. W. T. Sandford has been elected Clerk to the Board of Guardians of the Thakeham Union, in the Storrington District,



Sussex, in the room of the late Mr. A. Mant, Solicitor, deceased. Mr. Sandford has also been appointed to succeed Mr. Mant as Superintendent of Births, Deaths, and Marriages for the Storrington District.

Mr. William Davies, Solicitor, of Liverpool, has been appointed by the Town Council of that Borough to be Public Prosecutor for that body in cases tried before the magistrates.

Mr. Shafto Robson, Solicitor, of Gateshead, has been elected Clerk to the Justices for the Borough of Shields, in succession to the late Mr. Robert Wheldon.

Mr. C. B. Margetts, Solicitor, of Huntingdon, has been appointed Clerk to the Commissioners of Land, Assessed, and Property Taxes for that district, in succession to his father, Mr. Charles Margetts.

Mr. F. B. Marriott, Solicitor, of Stowmarket, Suffolk, has been appointed Clerk to the Board of Guardians of the Stow Union, in the room of Mr. E. P. Archer, Solicitor, who has resigned.

Mr. Keighly Walton, Solicitor, of Halifax, has been appointed Town Clerk of the Borough of Southport, and Clerk to the Southport Improvement Commissioners and Burial Board, in the place of Mr. C. S. Goodman, Solicitor, resigned.

Mr. Adolphus Edgar Church, Solicitor, of Colchester, has been elected Clerk to the Wyvenhoe Burial Board, in succession to his late father, Mr. J. H. Church.

Mr. William Harrison Peacock, Solicitor, has been appointed the first Town Clerk of the newly-constituted Borough of Barnsley.

Mr. James Gudgeon, Solicitor, of Stowmarket in Suffolk, has been appointed Registrar of the County Court at that place, in the room of Mr. E. P. Archer, who has resigned on account of ill-health.

Mr. George Moore, Solicitor, of Warwick, has been appointed Coroner for that town, in the room of Mr. Samuel W. Haynes, deceased.

Mr. C. B. Margetts, Solicitor of Huntingdon, has been appointed Coroner for the Hurstingstone Division of the County, in the room of his father, Mr. Charles Margetts, who has resigned.

Mr. Thomas Hayes Dewes, Solicitor, of Coventry, has, with the approval of the Lord Chancellor, been appointed Deputy Coroner for the Western District of the County of Warwick.

Mr. Frederick Price has been elected to the office of Coroner for the Manchester division of Lancashire in the room of the late Mr. Rutter.

Mr. J. D. Wadham, Solicitor, and Undersheriff of Bristol, will perform the duties of High Sheriff of that city for the remainder of the year in consequence of the demise of Mr. R. Phippen, High Sheriff.

Mr. A. Augustus Flint, Solicitor, of Uttoxeter, Staffordshire, has been appointed by the Chancellor and Council of the Duchy of Lancaster to be Steward of the Manor of Tutbury, in the room of Mr. J. P. Dyott, Solicitor, of Lichfield, deceased.

Mr. Michael F. Dwyer, has been appointed Registrar of Deeds, in the room of Mr. Morgan O'Connell, resigned.

Mr. George White, Solicitor, of Guildford, has been appointed Registrar of the Guildford County Court, in the room of Mr. Henry Marshall, resigned.

IRELAND.—Mr. Arthur Hamill, Q.C., of the North-East Circuit, has been appointed Chairman of Quarter Sessions for the West Riding of Cork, in the room of Mr. D. R. Pigot, promoted to the Mastership of the Court of Exchequer.

Mr. William D'Alton, Solicitor, of Dublin and Limerick, has been appointed Clerk of the Crown for King's County, rendered vacant by the death of Mr. Joseph Lyons.

Mr. William George Bradley, Solicitor, has been appointed Solicitor in Insolvency to the Official Assignee in the room of Mr. John Macnally, deceased.

Mr. Henry Keogh has been appointed a Resident Magistrate for the county of Londonderry, to be stationed at Londonderry.

SCOTLAND.—Mr. Moncrieff, the Lord Advocate of Scotland, has been appointed to the office of Lord Justice Clerk, in room of the late Mr. Patton.

Mr. Young, late Solicitor-General for Scotland, is the new Lord Advocate, in succession to Mr. Moncrieff.

Mr. Andrew Rutherford Clark, Advocate, has been appointed Solicitor-General for Scotland, in the room of Mr. Young, who has succeeded Mr. Moncrieff as Lord Advocate.

Mr. Gordon, Q.C., has been elected Dean of the Faculty of Advocates, in the room of Mr. Moncrieff, promoted.

Mr. Henry Inglis, Writer to the Signet in Scotland, has been appointed Solicitor in Scotland, for the office of Her Majesty's Woods, Forests, and Land Revenues, in succession to Mr. A. Murray, W. S., deceased.

EGYPT.—Sir Philip Francis, Judge of the Supreme Consular Court of Constantinople, has been appointed British Delegate on the Commission to inquire into the abuses of the Consular Jurisdiction in Egypt.

HONG KONG.—Mr. Julian Pouncefote, Attorney-General of Hong Kong, has been appointed to act as Chief Justice of that Colony during the absence of Chief Justice Smale, and Mr. Edward Hutchinson Pollard, of the Hong Kong Bar, has been appointed to act as Attorney-General of that Colony while Attorney-General Pouncefote officiates as Chief Justice.

INDIA.—Mr. Charles Robert Lindsay, of the Bengal Civil Service, has been appointed a Judge of the Chief Court of Punjab; Mr. John Cannon, Barrister-at-Law, confirmed in the appointments of Senior Magistrate of Police and Revenue Judge of Bombay, in succession to Mr. J. P. Bickersteth, Solicitor, who has resigned the office; Mr. James F. Stephen, Q.C., appointed legal member of the Supreme Council of India, in succession to Mr. H. Summer Maine, LL.D., who retires; Mr. J. M. Maskell, Barrister-at-Law, and acting Clerk of the Madras Court of Small Causes, appointed to officiate as Fourth Judge of that Court, in addition to his duties as acting Clerk; Mr. J. H. Spring Branson, Barrister-at-Law, to officiate as Registrar

of the High Court of Madras ; Mr. A. R. Scoble, of the Bombay Bar, Remembrancer of Legal Affairs to the Government of Bombay, in the room of Mr. J. S. White, promoted to be Advocate-General ; Mr. H. G. Pritchard, Solicitor, of Madras, Solicitor to the Government of that Presidency, in succession to Mr. H. J. Brockman, deceased ; Mr. W. M. Scharleir, Barrister-at-Law, of Madras, to act as Administrator-General of Madras, during the absence of Mr. J. Miller, and on his responsibility ; Mr. J. N. D. De Wet, Government-Advocate at Moul-mein, Government-Advocate at Rangoon, in succession to the late Mr. Donald Macleod, Barrister-at-Law, deceased ; Mr. J. W. Reid, Barrister-at-Law, and of the Madras Civil Service, to act as Civil and Session Judge of Tellicherry on the Malabar Coast, while Mr. Master is otherwise employed ; Mr. Herbert Cowell, Barrister-at-Law, elected by the Senate of the University of Calcutta, to be the first Tagore Law Professor in that Institution ; Mr. A. Stewart, Solicitor of the High Court of Calcutta, appointed by the Lord Bishop of Calcutta to officiate as Secretary to his lordship, and as Registrar of the Archdeaconry of Calcutta, in succession to the late Mr. W. H. Abbott, deceased ; Mr. W. T. Law, Advocate of Rangoon, appointed Government-Advocate at Maulipain, in British Burmah, Mr. Charles F. Farrar, B.A., of the Bombay Bar, to continue to act as Reporter of the High Court of Bombay, during the absence of Dr. R. T. Reid, who has obtained an extension of leave till January, 1870, and Mr. Donald Grant Macleod to be Judge of the Small Causes Court, at Rangoon.

NEW ZEALAND.—Mr. Henry Adams, Provincial Solicitor of Nelson, in the Colony of New Zealand, has been appointed Deputy-Superintendent of the province of Nelson.

WEST AFRICA.—Mr. D. P. Chalmers, of the Scotch Bar, has been appointed a Magistrate for the Gold Coast Settlement, and Assessor to the native Chiefs within the protected territories near or adjacent to those settlements.

WEST INDIES.—The Hon. John Lucie Smith, Attorney-General of British Guiana, who has just been made a Companion of the Order of St. Michael and St. George, has been appointed Chief Justice of the Island of Jamaica, in succession to Sir Bryan Edwards, who retires, and Mr. Mordaunt Pemberton has been appointed one of Her Majesty's Counsel for the Island of Nevis in the West Indies.

---

## Necrology.

---

### *July.*

- 9th. BANBURY, Robert, Esq., Solicitor, aged 53.
- 17th. WINGFIELD, J. M., Esq., Barrister-at-Law, aged 79.
- 18th. ABBOTT, William H., Esq., Solicitor, aged 47.
- 18th. SMALLBONE, Thomas, Esq., Solicitor, aged 69.
- 19th. HAYNES, S. William, Esq., Solicitor, aged 68.
- 20th. HEPPLER, William, Esq., Solicitor, aged 62.
- 26th. DEAN, G. W. C., Esq., Solicitor, aged 45.
- 28th. GREEN, James Fordham, Esq., Solicitor, aged 72.
- 29th. RUTTER, W. Smalley, Esq., Solicitor, aged 77.
- 30th. INGLEDEW, C. J. D., Esq., Barrister-at-Law, aged 36.

### *August.*

- 1st. TRAFFORD, H. Leigh, Esq., Stipendiary Magistrate of Salford, aged 60.
- 3rd. HAYWOOD, Joseph, Esq., Solicitor, aged 79.
- 3rd. WHELAN, W. Curteis, Esq., Barrister-at-Law.
- 5th. MORRISON, Hans, Esq., Barrister-at-Law, aged 27.
- 6th. PARKER, Hon. Neville, Esq., formerly Master of the Rolls of New Brunswick.
- 6th. SURRAGE, John, Esq., Barrister-at-Law, aged 51.
- 11th. SELWYN, Right. Hon. Sir C. Jasper, Lord Justice of the Court of Appeal in Chancery, aged 56.
- 14th. MACKEY, Bryan, Esq., Solicitor, aged 68.
- 14th. HART, Alexander, Esq., Solicitor, aged 70.
- 16th. TRIMMER, H. W., Esq., Solicitor, aged 36.
- 22nd. BENNETT, R. W., Esq., Solicitor, aged 56.
- 24th. WAUGH, George, Esq., Barrister-at-Law, aged 34.
- 25th. MANDER, H. Waterland, Esq., Barrister-at-Law, aged 83.
- 25th. EVANS, Edward, Esq., Solicitor, aged 41.

- 27th. **ELDERTON, C. Merrick, Esq.,** Barrister-at-Law, aged 70.  
27th. **EGERTON, E. C., Esq., M.P.,** Barrister-at-Law.  
29th. **DALY, D. B., Esq.,** Barrister-at-Law, aged 44.  
31st. **BIRD, Thomas, Esq.,** Solicitor.  
31st. **HAMER, T. Greensit, Esq.,** Solicitor.

*September.*

- 4th. **ORME, C. Cave, Esq.,** Barrister-at-Law, aged 26.  
10th. **BARKER, G. W., Esq.,** Barrister-at-Law, aged 37.  
11th. **SHOWLER, R. F., Esq.,** Solicitor, aged 48.  
15th. **MACPHAIL, G. Alexander, Esq.,** Solicitor, aged 75.  
15th. **HAWKINS, R. R. A., Esq.,** Barrister-at-Law, aged 55.  
15th. **CHESTER, Henry, Esq.,** Solicitor.  
16th. **HOGG, John, Esq., F.R.S.,** Barrister-at-Law, aged 69.  
17th. **KNOX, Hon. W. G.,** Chief Justice of the Island of Trinidad.  
23rd. **FERNES, T. Morton, Esq.,** Solicitor.  
27th. **COODE, George, Esq.,** Barrister-at-Law, aged 62.  
28th. **BURRELL, R. Anthony, Esq.,** Solicitor.  
30th. **SMITH, Richard, Esq.,** Solicitor, aged 51.

*October.*

- 5th. **LAW, W. J., Esq.,** late Judge of the Insolvent Debtors' Court, aged 82.  
8th. **ALLFORD, W. Naish, Esq.,** Solicitor, aged 81.  
10th. **DURRANT, G. J., Esq.,** Solicitor, aged 48.  
12th. **RAWLINSON, J. T., Esq.,** Solicitor, aged 56.  
15th. **HELLINGS, R. Hawkins, Esq.,** Solicitor, aged 74.  
15th. **WOODBIDGE, T. Anthony, Esq.,** Solicitor, aged 63.  
17th. **JONES, Thomas, Esq., Q.C.,** aged 57.
-

THE  
*Law Magazine and Law Review* :  
OR  
QUARTERLY JOURNAL OF JURISPRUDENCE.

---

---

No. LVI.

---

---

ART I.—LIFE ASSURANCE.

**H**ITHERTO the Legislature has given itself little concern with the contract of life assurance, though it is one distinguished from other contracts in several important particulars. The fulfilment of it on the part of the assurers is postponed to an indefinite period, and depends on strict conditions of punctuality of payment, &c., on the part of the assured; it cannot be put an end to earlier without loss to him, and gain to them; and, when the sum assured comes to be payable, the persons liable may, by transfer or by mere succession, have come to be a very different body from those with whom he originally contracted. It seems but reasonable, therefore, that the assured should have some special legislative protection. We propose to set forth succinctly the provisions relating to life assurance that are to be found in the Statute Book, and to suggest principles for future legislation, which will probably now not long be deferred.

The earliest Statute affecting life assurance is the 14 Geo. III. c. 48 (1774), which has obtained the sobriquet

of the "Gambling Act." It recites that it has been found by experience that the making assurances on lives, or other events, wherein the assured hath no interest, had introduced a mischievous kind of gaming; and it enacts that no insurance shall be made on an event in which the party insured hath no interest, and that in all policies the name of the party interested shall be inserted, and nothing more shall be recovered than the amount of his interest. This Act was directed against an abuse then prevalent: but it is scarcely too much to say that, in modern times, it has never availed to prevent an illegitimate transaction, and has never been put in force except to evade a just claim.

This Act has been mischievous, also, in the colour which it has given for the early and mistaken decisions of the judges that life assurance is a contract of indemnity. This doctrine, though contrary to common sense, held sway until 1855.

Up to 1844 the Statute Book is silent as to the persons who might enter into contracts of assurance, usually called "policies," i.e. promises. They might be made between individuals (*March v. Pigot*)\* or granted by chartered companies, or by partnerships. Such partnerships as existed before November 1, 1844, for carrying on the business of life assurance, have never been subjected to any regulations as to publicity, or registration, or rendering of accounts.

By the Joint Stock Companies' Act of 1844 (7 & 8 Vict. c. 110) it was enacted that all associations for assurance of life, whether "proprietary," or "mutual," established after its passing, should come within its provisions. They were required to deposit with the Registrar of Joint Stock Companies a copy of their Deeds of Settlement, and to return to his office every year an audited balance-sheet.

\* Burrow, 2803.

These documents were to be open to the inspection of any person, on payment of one shilling.

The effect of this Act was precisely the reverse of what might have been expected, and what its framers certainly hoped for. Previously to 1844 it had been difficult to start an assurance company, except in obedience to some genuine public demand. The passing of this Act brought into existence the trade of "company-promoter," which became so profitable that assurance companies were registered by scores. The mere fact that a Government office was open to receive documents lulled to sleep all suspicion in the public mind as to what those documents might disclose.

The balance-sheets were returned in due course to the Registrar, and published in official blue books, besides being reprinted, both in full and in abstract, by earnest and intelligent volunteers. Many of them were so sent in, that no sufficient information could be obtained from them, items being grouped together in such a manner as to conceal the facts which it was important to know. This, of itself, should have excited suspicion.

The returns, insufficient as they were, did establish beyond a doubt two facts:—first, that most of these companies were squandering in expenses of management far more than a proper proportion of the premiums they received; second, that few indeed of them cared anything about accumulating the reserve necessary to meet the claims that must come upon them in the future. Yet the knowledge of these things had no effect in bringing the sinning concerns to a stand; those already assured could not withdraw, and even new policy-holders were obtained through highly-paid agents and canvassers. When the time came that an actuarial valuation refused to produce any "bonus," then "amalgamation" was resorted to.

This mischievous state of things was not without its effect on the older companies, many of whom found it necessary



to compete with their rivals, by offering the same high commissions for introduction of business, &c. "Bonuses" to the assured were found to be so attractive that, in order to be able to advertise the declaration of "a handsome bonus," companies not unfrequently pledged a great portion of their future profits. The business of making provision for families was carried on with eyes deliberately shut to the future.

The next Statute to be quoted affects life assurance beneficially. By the Income Tax Act, 16 & 17 Vict. c. 34, s. 54, any person who makes insurance on his life, or the life of his wife, is entitled to deduct the amount of annual premium paid by him from the amount for which he is liable to be assessed, but not to a greater extent than one-sixth part of his whole assessment. At the time this Act was passing, one of the many abortive attempts to reduce the whole business of life assurance to a regulated system was in progress. The insurances under which exemption was to be claimable were only such as should be effected "with any Insurance Company registered under any Act, to be passed in the then present session of Parliament for that purpose, and complying with the requirements of such Act." No such Act, however, became law, and it was necessary, by a subsequent Act (c. 91 of the same session), to define the assurance companies, whose policies entitled the holders to abatement, to be "all existing in 1844, or registered under the Joint Stock Companies' Act of that year."

The principle of the Joint Stock Acts continued to prevail till the Act of 1862 omitted all clauses requiring the depositing of annual accounts with the Registrar. The principle of this Act is that the public are entitled to know—first, with whom they are dealing; second, the conditions under which their contracts are entered into. Accordingly, the Articles of Association are required to be printed and registered, and an annual return is required to be made of

the shareholders and the changes in their body. The financial condition of the concern is treated as a domestic matter merely.

Assurance companies and banks, however, under the Companies' Act, 1862 (s. 44), are required twice a year to prepare, and to keep suspended in their registered offices, a statement of the capital of the company, the number of shares issued, and the amount paid thereon, and an abstract of the liabilities and assets. The abstract of assets is of the most meagre character possible; everything that is not in Government securities, bills of exchange, or cash, being required to be grouped under the title "other securities." By ss. 209, 210, every insurance company registered under the Joint Stock Companies' Acts (that is, every company established since 1844) was required to register under the Companies' Act.

The only remaining Statute affecting the commerce of life assurance is the 30 & 31 Vict. c. 144, "The Policies of Assurance Act, 1867." This was passed to remedy the defect in the law by which (a policy of assurance being a *chose in action*) the assignee was unable to sue for the amount assured without using the name of the assured person. This Act (as Mr. Bunyon\* points out) does not make policies assignable at law in direct terms, but it provides that any person possessing an equitable right may sue in his own name.

We have given this brief summary of the existing Statute Law relating to Life Assurance and Insurance Companies, as introductory to the inquiry—how it should be amended? With this purpose one Bill was introduced in 1867 into the House of Commons, by Mr. G. Shaw Lefevre, now Secretary to the Board of Trade; and another in 1869 by the Right Hon. Stephen Cave. The first had for object a beneficial extension of the advantages of life assurance; the second the regulation of dealings between the companies

\* "Law of Life Assurance." 2nd. Edit., 1868. Laytons, 150, Fleet Street, London.

and the public. It will be convenient to take first into consideration the latter measure.

Mr. Cave's Bill \* proposed to require more extensive returns than formerly of the funds and liabilities of assurance societies. A very good form of return was provided. It is evident that the information those who deal with an insurance company require is:—

- (1.) A statement of the actual securities upon which the funds are invested, with the amount of interest annually produced.
- (2.) Particulars of all the liabilities of the society.
- (3.) Information as to the law of mortality and rate of interest adopted in making the actuarial valuation.

Mr. Cave's Bill is very well devised for obtaining these particulars; and, if it were enforced, and the results studied by the public, they would pretty clearly understand the position of each company.

The knowledge of the actual position of a company, however, even supposing it to be obtained, is but one element in the question. Under the present system of life assurance the policy-holder has no choice but to keep up his policy, whatever the position of the company may be. If he drops it he loses all he has paid, and for the company to consent to give him full value for it would be unfair to those who remain. It is a fallacy to suppose that an assurance policy can possess a "guaranteed surrender value," equivalent to the unliquidated risk. The company must have the right to charge something for the selection exercised against it.

Once insured in a company, the knowledge that it is on the road to insolvency is of little value unless accompanied by the power to stop its progress thither. If the company is a proprietary one, the policy-holders cannot possess such a power. Even in a mutual society, they are likely to be

\* Bill 36, 1869. H.C.

deterred from exercising it by arguments which are presented to them in the light of prudential considerations. It is not for them to do anything which would check the inflow of new assurers to share the risks with them.

The mistake, which lies at the bottom of the whole mischief, which renders the Legislature practically powerless, and those concerned wilfully blind, is that life assurance has been treated from the very first as a matter of speculative business. When, in 1720, the Government of the day accepted 60,000*l.* from the merchants of London as the consideration money for Royal Charters to the London Assurance Corporation, and Royal Exchange Assurance Corporation, they acted on this principle. It was, of course, supposed that by carrying on the business of assurance, the subscribers would make profits that would amply repay them for this gift to the public treasury.

So, when companies in the present day advertise the high price at which their shares are saleable, or the large bonuses they have added to their policies, they deal with life assurance as a matter of trade. And when commissions are offered to introducers of "business," when the faulty condition of a company is glossed over lest new members should not join it, or when a price is demanded for the "goodwill" of a company selling its "business," the same principle is being acted upon—only in a more ruinous direction. In too many cases the one form of error has led to the other, and companies have thrown away funds, that ought to have been husbanded to meet their risks, in efforts to obtain such a show of "new business" as would appear to justify the declaration of large bonuses.

Policy-holders should understand that the contract of life assurance is one from which every element of uncertainty ought to be removed. The distinction between "profit" and "non-profit" policies ought to be done away—the premium should be the exact equivalent of the risk, without margin for commission, or profit, or anything but the

necessary expenses. There would still be liability to fluctuation, for "laws of mortality" are not laws of nature, but nothing more.

Attempts to make profit by getting high interest for the money invested should be discouraged. High interest always means bad security, and assurance companies should be as strictly limited to investments in the best class of securities as trustees are. In point of fact, the monies received should be looked upon as trust monies.

If, instead of being managed as a business by proprietary companies desirous to make profits for their shareholders, or by mutual societies desirous to make profits for their participating policy-holders, life assurances were only granted by Boards of Trustees with limited powers of investment, and no speculative interest in the matter, two results would follow :—

- (1.) No such Board would be formed except in obedience to a genuine public demand, and of men possessing public confidence.
- (2.) Vast numbers would prefer to have the Government as their trustee, if it were willing to accept the trust.

By the 16 & 17 Vict. c. 45 (1853), the National Debt Commissioners were empowered to grant policies of assurance to persons who purchased from them at the same time deferred annuities. As these are the very persons to whom a policy of assurance could be of no service, no policies were ever granted under this Act. But in 1864 (by the 27 & 28 Vict. c. 43) the Government Life Assurance Department, now worked through the Post Office, was established, and has had a measure of success.

This Act fixes the limit of the amount for which the Government will grant an assurance at not less than 20*l.*, nor more than 100*l.* The first limit is too high, the second too low. Indeed, there is no reason why there should be any limit at all.

The main object which Mr. Gladstone, who brought in the Bill, declared he had in view, was to afford to the working classes a means of assurance which should be safer than their friendly and burial societies. Few of such societies, however, grant assurances as high as 20*l.*; 5*l.* or 10*l.* is as much as the average of their members require.

The French Government has avoided this error in the life assurance department, recently instituted in France under State guarantee. There is no minimum limit of assurance, but the maximum is fixed at 120*l.*\* The Government moreover, issues collective guarantees to the friendly societies themselves.

If all limits on Government assurance were removed, the present system of offering small assurances to the working classes, without much reliance upon medical examination, might be continued; while, with respect to the larger policies, these would of course only be granted in accordance with the recommendation of the medical men consulted. The Government has always available the best medical skill, and the time might not be far distant when a sufficient number of lives would be assured through this means to enable the system to be carried to the fullest extent of its beneficent powers, so that no life whatever should be deemed absolutely uninsurable, but every man be admitted to the benefits of life assurance at a price corresponding to the actual state of his health.

Whether an extension of life assurance in this direction be practicable or not, the result of the establishment of a Government office for general life assurance would probably be that it would be thought as absurd to set up a new speculative assurance office as it now is to establish a new voluntary savings' bank. The history of savings' banks, since the foundation of the Post Office Savings Bank, would, in fact, be repeated with regard to life assurance companies.

\* Report of the Registrar of Friendly Societies in England for 1868, p. 72.

Many of those which are now in a sound condition might continue to exist side by side with the Government office, the remainder would gradually seek absorption in it. For many years, perhaps, old associations and the slow growth of new ideas would continue to carry people to the assurance companies, but the other system would be steadily growing in the meanwhile.

The whole force of this argument depends on the principle that life assurance is not a trade but a trust. If it is a trade, nothing could be more pernicious than for the Government to undertake it; if it is understood to be a trust, no private body could execute it equally well. We have no doubt the latter view will, in the end, secure general assent.

While assurance companies continue to exist, however, provision for their future regulation will have to be made; and though we have little faith in the efficacy of returns, yet those set forth in Mr. Cave's Bill it will be desirable to obtain. It contained also a clause with respect to amalgamations. This branch of the question requires some consideration.

When a company becomes unsound the best, almost the only, remedy is immediate amalgamation, before its affairs fall into a worse condition. By this means only can its expenditure be sensibly diminished, its average of risks increased, and its policy-holders obtain better security. If, however, the amalgamation is so managed as to increase rather than diminish the expenditure, if the union takes place without a proper estimate of the risks on both sides, and the setting aside a sufficient amount to meet them; then it must, sooner or later, lead to the bankruptcy of both companies.

We here use the word "amalgamation" in its popular application. In the strict sense of the term an amalgamation of two companies can rarely, if ever, take place. The transaction is really a transfer of the policies and

assets of the one company to the other, in consideration of a payment in cash, or an allotment of shares, to the proprietors of the transferring company.

In companies under the Act of 1862, sections 161 and 162 regulate these transactions, and make them binding on all concerned, unless an order be made for winding-up by the Court within twelve months from the resolution for selling the "business," and the Court then refuses its sanction. The partnerships which existed before 1844 are excluded from the benefits of this provision; and a recent decision (*In re Family Endowment Society*\*) has subjected them to the provisions of Part VIII. of the Companies' Act, relating to unregistered companies. While this decision is subject to appeal, it would be improper to comment upon it, but it may be remarked that it seems an extreme application of these clauses in the Act of 1862, to bring within their operation a partnership, the transfer, or supposed transfer, of the business of which took place in 1861. As to the clauses themselves, the policy of the Legislature in making a mere partnership a company for the purpose of winding-up, and for that purpose only, is open to grave doubt.

Mr. Cave's Bill proposed to enact that in all cases of amalgamation or transfer, copies of the agreement for the purpose, the actuarial reports, and lists of all payments to be made, shall be deposited with the Registrar of Joint Stock Companies within ten days from the date of the "completion" of the amalgamation or transfer. If this be amended to, or defined to mean, the date of the resolution passed by the transferring company, then the provision of the Companies Act, which allows the Court to intervene within one year, ought to answer the purpose of protecting the assured against transfers injurious to their interests, as well as that of protecting shareholders against the

\* Weekly Notes, Nov. 27, 1869, p. 239.



revival, many years afterwards, of a liability they supposed to have been utterly extinguished. The assured would, at least, have the power of so protecting themselves, if they cared to exercise it.

On the whole, therefore, though Mr. Cave's Bill provided only for the registration of certain documents, and was thus merely an extended application of the principle which, under the Act of 1844, had already been found to fail; yet, coupled with the spread of better practical information about life assurance, and the lesson which policy-holders have learned of the risks they are incurring, it would be as effective in keeping those assurance companies which may survive in the safe path as mere legislation can possibly be.

On most questions of efficient administrative control, the practice of the French is worth studying. By a Government regulation of January 22, 1868, assurance societies in France are subjected to the following provisions:—

1. The capital paid up must not be less than 2000*l.*, even where the subscribed capital is less than 8000*l.*

2. The shares cannot be made transferable to bearer, until a reserve fund has been accumulated, equal to the uncalled capital.

3. Twenty per cent. of the net profits is to be carried to the reserve fund till it amounts to one-fifth of the whole capital.

4. The funds, less the necessary expenses, must be invested in real property, Government stock, Treasury bonds, or other securities created or guaranteed by the State, shares of the Bank of France, departmental or communal bonds, debentures of the *Crédit Foncier* or of railways having a minimum interest guaranteed by the State.

5. Every policy must contain a statement of:—

- (1.) The subscribed capital.

- (2.) The amount paid up ; and whether shares have been made transferable to bearer.
- (3.) The maximum held on any one risk, without reinsurance.
- (4.) The other kinds of insurance, if any, granted by the society, and the amount of capital applicable to them.

6. Every policy-holder, or any person authorised by him, is entitled at any time to examine the last balance-sheet, either at the head office of the society or at any of its agencies. He may also require a certified copy of the same on payment of a sum not exceeding one franc.

The measure we have referred to as introduced by Mr. Shaw Lefevre, in 1867, bore the title of the "Life Policies Nomination Bill."\* Its object was to enable persons to secure to their wives and children the benefit of assurances on their lives by nomination endorsed on the policy. For the humbler class of policy-holders this advantage is obtained by the Friendly Societies' Act (18 & 19 Vict. c. 63, s. 31), which provides that any person, on whose death a sum not exceeding 50*l.* is payable by a society, may nominate his or her husband, wife, child, father, mother, brother, sister, nephew, or niece, to receive it. For those who effect policies of large amount, also, this benefit is practically obtainable by the system of settlement upon trust. Between these two extremes, however, there is a very numerous section of the public, to whom Mr. Shaw Lefevre's measure would be a great boon.

Mr. Scratchley† is the warm advocate of this amendment in the law, as he was of that for giving assignees the right to sue in their own names, now conferred by the Act of 1867. He petitioned Parliament in 1863 for these amendments. He says of the proposed system of nomination:

\* Bill 19, 1867, H.C.

† "Treatise on Life Assurance and Reversions." New Edition, 1867. Layton, 150, Fleet Street.

"This is intended to remove the most important and forcible of the legal obstructions, which press heavily on those to whom life assurance is most appropriate and valuable."

We will take for an example the case of a man who, being engaged "in commerce or otherwise, and earning by his own labour a precarious income, depending upon his life, has effected an assurance in order to give his wife and family the means of support if prematurely deprived of his exertions. As the law at present stands, if the assured should die insolvent, or become so at any period whatever, after the policy has been effected, it would become the property of his creditors, to the exclusion of the widow and children for whose benefit it was originally obtained and kept in force, at, perhaps, considerable pecuniary sacrifice and self-denial. This result might, it is true, be avoided by making the policy the subject of a trust; but there are many reasons which operate to prevent small policy-holders from executing trust deeds, such as their expense, the difficulty of finding trustees, the complexity of their provisions, a natural desire to avoid transactions that involve legal formalities, which are so distasteful to men in all positions of life. And so generally do these objections prevail, that scarcely one policy in a thousand becomes the subject of a settlement upon trust. . . . Every man has nominally a legal right to protect his property from future debts, yet in the very cases in which one ought to be so protected, viz., where his means are limited, and the amount secured by his policy is small, it is practically impossible for him to avail himself of his legal right to do so. A state of the law which thus, practically, concedes to the rich, and denies to the poorer man, the privilege of setting aside a very small portion of his annual earnings, so small that no creditor could say the debt was contracted on the credit of it, or that the means of payment were thereby lessened, for the sacred purpose of supplying to his family the lack of his strong arm, should death lay

him low, could scarcely continue if it were generally understood."

With the urgency of this appeal we have every sympathy. Indeed, without waiting for the action of the Legislature, Mr. Bunyon has induced the directors of the company of which he is actuary to agree to grant settlement policies, by which they act as trustees for the assured. If even other companies were willing to follow this excellent leading, still the Nomination Bill of Mr. Shaw Lefevre would be necessary for Government assurances, and for numerous cases in which the settlement policy form drafted by Mr. Bunyon would not be available.

We recapitulate briefly the amendments in life assurance law which we think desirable:—

(1.) That all existing partnerships for granting life assurances should be required to register under the Companies Acts.

(2.) That the powers of investment of assurance companies should be restricted.

(3.) That the provisions of Mr. Cave's Bill relating to registration of accounts, and of the particulars of amalgamations or transfers, should pass into law.

(4.) That Mr. Shaw Lefevre's Bill, for enabling the holders of small policies to nominate their widows or relatives to receive the sums assured, should pass into law.

(5.) That the statutory limitation of the amount for which the National Debt Commissioners are empowered to grant life assurance policies to 20*l.* as a minimum, and 100*l.* as a maximum, should be altogether removed.

If this be done, those, on the one hand, who are content with absolute security for the amount they set aside for their families may take a Government policy, and nominate the relative who is to receive the sum assured. Those, on the other hand, who are dazzled by the past prosperity of some of the assurance companies,

and willing to cast in their lot with a speculative concern, will do so with all the guarantee that can be devised for their safety. They will know how their affairs proceed, be able to check the company if it enters on a ruinous course, and to control the conditions of amalgamation or transfer, if that should become necessary. More cannot be done for them; and, if these safeguards do not avail for their protection, they have only themselves to blame.

---

#### ART. II.—THE CITY COURTS.

THERE are 500 County Courts in England and Wales, the annual loss on which, some quarter of a million, is made good out of the taxes. There is one "City" County Court, the property of the Corporation of London, the business of which will for the present year leave a net profit from the fees of some 5000*l.* after payment of the Judge, the City Solicitor as Deputy-Registrar, and the other officials. The cause of the disparity is the same in each—the number of complaints. In the latter the number, although mostly small business, pays a respectable profit; in the former, although more than a million complaints may be issued by the 500 courts, the average sued for being little over 2*l.*, certain heavy loss accrues. A remedy has been suggested, by simply reducing the present heavy court fees on debts between 5*l.* and 20*l.*, and allowing the attorney some trifling profit. Recent legislation has only tried (ineffectually) to force suitors into the County Courts by refusing costs in the higher tribunals. The result was clearly shown by the judicial statistics for 1868. While writs of summons were reduced in number by 44,000, or more than a third of the whole, the average of the business in these 500 County

Courts was reduced from 2*l.* 7*s.* each in 1867 to 2*l.* 1*s.* 3*d.*, although the number of plaints was increased some 30,000.

The fact is, that in the majority of County Courts the total fees received do not pay the Registrar and Bailiff's salaries, and in a large number of instances there is not enough taken even to pay the Registrar's minimum salary of 120*l.* Several places indeed produce less than 50*l.*, and one only 30*l.* from all the year's fees! The salary of country Registrars is certainly too low for gentlemen who must be practising solicitors, and (except in the City Court) act as judges in trying undefended causes, and this minimum of 120*l.* is increased in a very unsatisfactory way:—4*l.* for each twenty-five plaints beyond 200 entered in the year, and as the average is only about 2*l.*, and only half the plaints reach a hearing, the total fees rarely average more than 4*s.* each, or about the extra salary for the Registrar alone. The "City" Court, however, having no other court to affect its receipts, is a very flourishing concern in a financial sense. In all other respects its position is most anomalous. This court is a substitution for the old Court of Requests held by Commissioners under 5 & 6 Will. IV. c. 94, and derives its present jurisdiction from the Act 15 Vict. c. 77, a Local Act obtained by the Corporation to extend their first County Court Act of 1847; and the large powers given by the Legislature show very forcibly the necessity for the same careful supervision of Bills introduced into Parliament by the Corporation of London, as that wealthy body always exercises in respect to all Bills, Government or otherwise, in the least degree affecting their interests.

The County Courts Act, 1850, had given the General Courts optional jurisdiction to 50*l.* and the City reasonably enough asked for a similar extension, but so little was their Local Act scanned, that it contained a clause depriving Plaintiffs not recovering more than 50*l.* of all costs of suit, if the action might have been brought in the Sheriff's

Court, unless the Judge specially certified the action to be fit for a superior court. In two very material points the jurisdiction of the City Court is also much larger than any other County Court. (1st.) Where Defendant was employed only in the City, or had been so employed within six months of plaint. (2nd.) Where any part of the cause of action arose in the City without the necessity of any leave of Judge or Registrar. Had the lawyers in either House scrutinised this Local Act, it is most improbable that any of these additional powers would have been conceded, more particularly that of depriving Plaintiffs of costs between 20*l.* and 50*l.*, while all suitors elsewhere in the kingdom had an option between the County and Superior Courts. The Corporation also took the power, then possessed by the other County Courts, to levy 6*d.* in every plaint exceeding 20*s.* towards a building fund. This has been long since repealed for all the general courts, (although by reason of the loss in the great number of courts the total fees are not reduced,) but is still claimed and received at Guildhall Yard by the Corporation, in trust, we presume, for suitors. When the clause in the City Act affecting costs of suit between 20*l.* and 50*l.* came before the Judges, much surprise was expressed, and it very soon became a dead letter by their lordships invariably certifying for costs, and notwithstanding the vigilance of the five able lawyers employed by the Corporation, this power was swept away by the last County Courts Act, 1867, and by sec. 35 of that Act, the words "County Court" used in that or any future Act, are declared "to include the "City of London Court," and the rules and orders in force for the time being for regulating the practice of and costs in the County Courts, and forms of proceedings therein, are to be in force in the said City of London Court, to the exclusion of any rules and orders then in force in that court," reserving only powers for the Corporation to receive the fees. The County Court Act, 1867, as

our readers know, contained several very useful provisions, especially secs. 2 and 3. By the 2nd section creditors exceeding 2l. for goods sold for trading purposes can by filing an affidavit, given in the schedule to the Act, obtain a judgment for half the hearing fee, unless defendant gives the Registrar notice of defence. By section 3 the very convenient power given in 1856 to all suitors, resident or carrying on business in any of nine Metropolitan County Courts, to sue their debtors, resident or carrying on business in any other of such courts, is expressly extended to the City Court. On this useful section much needless trouble is thrown on suitors in the City Court. Although the Judge frequently explains the benefits of this section, and advises suitors to use it, when complaints are taken to the Registrar's Office, on entry the clerks are directed to inquire where the cause of action arose, and if there be any reason for considering same to have arisen in any part within the City, the summons is always issued under the Local Act of 1852, and fees for foreign service under that Act charged instead of the general County Court scale. Unfortunately the Judge is powerless to interfere directly, he does, however, all in his power to discourage this course by requiring suitors in such cases to prove a cause of action in the City, and nonsuits frequently happen, where plaintiffs had a clear right to sue in this court under the section in question. The extra cost of the summons issued under the old Act is generally trifling, but the increased expense in fees is carried through the proceedings. Consent judgments, for instance, under sec. 3, would only be half the amount of the old fee, and jury causes, applications, and notices also lower.

By secs. 16 and 17 of the County Court Act, 1867, Registrars are required to try undefended actions on contract, and to settle amount of instalments in admitted cases. The City Court has quite as many complaints as the largest Metropolitan Court (the number during 1869 was



about 16,000) and this court has also since January 1, 1868, been to all intents a County Court. We have also seen the extra matters of jurisdiction this court retains under the Local Act of 1852, and to these must be added the Admiralty jurisdiction under the Acts of 1868-9. The learned Judge and the Assistant-Registrar are everything that could be desired by the public and profession. The offices of Registrar and High Bailiff have, however, been vacant several years, and upon opening the court after the autumn vacation in 1868, the Judge, in pursuance of rule 8 of the Consolidated Orders, under the Act of 1867, appointed a qualified solicitor to act as Deputy-Registrar in the absence of the City Solicitor, whose other official duties prevented his personal attendance in court, and who, we understand, in fact, had refused to attend in court, and this gentleman sat in court several days as Deputy-Registrar, and exercised, for the only time in this court, the powers of the Act in trying undefended causes. Although more than a year has elapsed the suitors still wait the pleasure of the Corporation to appoint a Registrar competent and willing to discharge the duties in court. So much for the rules of court in the "City Court." As to the fee of 6*d.* in every plaint exceeding 20*s.* towards the building fund, although this must now amount to thousands of pounds, the old court in Guildhall Yard is the most inconvenient, the dirtiest, and from the crowds necessarily collected (the Judge himself having to try all causes, both defended and undefended), comparatively the smallest, alike destitute of any proper ventilation or firing, therefore equally unsuitable as a court in all seasons. The only accommodation for bar and solicitors are two benches, capable of sitting five each, one of these being used for the jury when required. The daily average of causes exceeds 100, and more frequently 200, and as no constable or officer is employed to keep order in the offices and approaches, the number of touters and hangers-on greatly

---

exceeds any other court. Surely a little of this building fund might be usefully applied, if not in "building" a suitable court proportionate to the business and receipts, at least in providing some necessary accommodation for suitors, if indeed the time has not arrived for sweeping away all special powers and privileges of this City Court.

The Lord Mayor's Court is a municipal court—we believe the oldest in the land. Its practice is more like that of the Superior than the City Court. The regular Judge is the Recorder of London in office, with a permanent Registrar and Deputy-Registrar. All these offices are now held by gentlemen of undoubted legal ability, and, since the last abortive legislative attempt to force suitors under 20*l.* into the County Court, the business of the court has very much increased, to the satisfaction, we believe, of nearly every one, not excepting defendants as a rule, for although some moderate costs are allowed attorneys for all their work in cases exceeding 5*l.*, the court fees being very small, the total in ordinary cases little if anything exceeds the County Court, without the annoyance. For instance, the costs against a defendant under 10*l.* are 18*s.* 6*d.*, and under 20*l.* only 24*s.* 10*d.*, while the court fee for summons alone in an ordinary case in the County Court. say 9*l.* and 19*l.* respectively, would be 10*s.* and 20*s.*; and the judgment by default would be even more in favour of the Mayor's Court, being, for these cases, only 7*s.* 6*d.*, and 12*s.* extra, against 18*s.* and 38*s.* respectively in the County Court for hearing, obligatory, unless the defendant consents to a judgment, in which case half the latter fees are saved, and then some costs will almost necessarily be incurred for witness and attorney. We have no desire to praise the Mayor's Court unduly; but the contrast in the sort of business attracted by their scale of fees, certainly justifies the opinion that County Court fees are unduly high, and that their reduction would benefit all parties, including the ordinary tax-payer, who now

makes up the serious deficiency in their annual accounts. There are two matters, however, in the Mayor's Court which we should like carefully considered. The power to remove their judgments into a Superior Court for the purpose of execution. This especially in small cases (say under 20*l.*, and beyond this there is no difficulty in suing in the Superior Courts), we consider acts oppressively on debtors in this way. We have seen that a judgment, say for 19*l.* odd, is obtained for about 2*l.*, and the action may have been served anywhere in England, but if execution against defendant's goods is required, the attorney's extra costs are over 2*l.*, and the sheriffs' fees some 3*l.* Much as we admire the present practice of this Municipal Court, we think suitors should be limited to the process of the court they select, and not be allowed thus to increase costs against debtors. It should be remembered that the Mayor's Court is strictly a local court, and until the Corporation, with their usual success, obtained their Local Act, the "Mayor's Court Extension Act, 1857," no process could be served outside the City boundaries; and therefore the removals of judgment were comparatively harmless. This court also exercises very large powers of "foreign attachment," by which, under a very old custom of London, money or goods in the hands of a third party within the City may be attached to answer any debt sworn to be due by their owner. By this custom such debtor is required to be solemnly called at three separate courts before such attachment issues; but, by the modern practice of this old custom, the attachment issues instantaneously upon an action being commenced, and an affidavit of indebtedness filed, and so far from the debtor, the defendant being "three times solemnly called," he is carefully kept in the dark that an action is commenced. The action in attachments in practice never being served. This "foreign attachment," by the same vigilance of the Corporation lawyers, has been carefully exempted from the "Debtors'

Act, 1869." As law reformers we would desire some proper examination into this old custom, and, without wishing its destruction, should like to limit its operation at least to causes of action properly belonging to the City of London, if indeed it should not be restricted to the same powers of attachment possessed by all the superior courts and other inferior courts by the "Common Law Procedure Act, 1854."

In many respects we consider the Mayor's Court, and its Local Act also, models for future County Court legislation; but, if intended for general instead of corporate benefit, many details would need revision, *e.g.* why should objections to the jurisdictions be limited to a plea which necessitates appearance in person, and, where defendant succeeds, no costs allowed. In the other City court suitors often speculate in actions against debtors at long distances, but, when they fail to shew jurisdiction, the usual result follows as to costs of defence. The doubt often arises whether two separate courts in the same locality, like the City of London and Lord Mayor's Court, are necessary or useful. Why not amalgamate their respective functions, availing of the Mayor's Court procedure above 5*l.* for its manifest advantage to suitors, and leaving smaller debts to be disposed of, when undefended, by the Registrar, as provided by the last Act, and entering opposed cases for the Judge's list, say, once a week. This would give an extra Judge for contentious business, and, at the same time, effectually relieve the Judge of the City Court from the matters of mere routine, which at present employ so much valuable time. We throw out this suggestion on the assumption that the "City" Court will retain a separate and Local Act; for ourselves we should greatly prefer placing the City of London in all respects on a level with Westminster, Lambeth, and all the principal towns and cities of the empire. We will hope that the Judicature Commission now sitting may inaugurate a new system for the benefit alike of suitor and practitioner.

G. M. W.

### ART. III.—EXEMPTION OF PRIVATE PROPERTY ON THE OCEAN.

**F**OREMOST amongst the vexed questions of public law which press for a solution, is the exemption of private property on the ocean from capture and confiscation as prize of war.

The cases on this branch of the law of nations range themselves under two classes—first, where the trader who engages in commerce with a belligerent power is the subject of a neutral State; and secondly, when the country of which he is a subject is itself one of the belligerents. Of these cases the former is that which it is proposed in the first instance to examine, not only because it involves more directly a conflict of law, but also from the larger commercial interests with which it deals.

It may be useful at the outset to state what the position of the law on this subject is, as laid down by judges and text-writers of authority on the law of nations. It is thus stated by Chancellor Kent—"It is," he said, "a well settled doctrine that there cannot at the same time exist a war for arms and a peace for commerce."\* And to a similar effect is the language of Sir William Scott—"There exists," he observed in a well-known case, "such a general rule in the maritime jurisprudence of this country, by which all trading with the public enemy, unless with the express permission of the sovereign, is interdicted. It is not a principle peculiar to the maritime law of this country; it is laid down by Bynkershoek as a universal principle of law."† This doctrine, which may be known as the rule of identification, thus so explicitly stated, and at the time of universal acceptance, rests on two theories or positions, one peculiar to the law of

\* 1 Kent's Com., 75.

† The Hoop, 1 Rob. Rep., 201.

England, the other, of more general obligation as an axiom in jurisprudence. The first of these is the principle alluded to by Sir W. Scott in the case quoted, that, by the law and constitution of this country, the sovereign alone has the power of declaring war and peace; and the second is, the position that, under the law of nations, on the commencement of war, each citizen is so closely identified with the government of the State of which he is a member, as to become personally an enemy of the nation with which his country is at war. To adopt the language of a distinguished American judge, "Every individual of one nation must acknowledge every individual of the other nation as his own enemy, because he is the enemy of his country." And again—"Whatever relaxation of the strict rights of war the more mitigated and mild practice of modern times may have established, there has been none on this point. The universal sense of nations has recognised the demoralizing effect that would result from the admission of individual intercourse between States at war."\*

Connected with these two propositions is the further principle under which sea-borne property, whether ships or goods, is from the mere circumstance that it is sea-borne placed in a different category, and is the subject of different laws from property on land; this distinction lies at the root of the modern theory of the law of prize.

These principles were not, it is to be observed, laid down without qualification. At the same time that they took their place amongst the admitted doctrines of the public law of nations, they were guarded by certain exceptions which have also received judicial sanction, and the recognition of which has led to the direct conflict of law which exists on these subjects. These exceptions have operated to produce that alteration to which Sir W. Scott referred when he spoke, not without much censure, of those whose aim it was to change the nature of hostilities as it has ever existed amongst

\* By Ch. J. Marshall, in "The *Rapid*," 8, Cranch's Rep., 155.

mankind, and to introduce a state of things which had not yet been seen in the world—that of a military war and a commercial peace.\* To the proposition, for example, that there cannot be at the same time a war for arms and a peace for commerce was attached the qualification, which during the recent war with Russia had such a large influence on commerce, that trade with an enemy might be carried on by the express license of the sovereign; an exemption from the liabilities and forfeitures arising out of a state of war, which it was further held should receive a most liberal construction.† Again, the trader who was a subject of a neutral State was warned that the first duty of one in his position, was wholly to abstain from direct or indirect interference by way of aid to either of the belligerents—absolute non-intervention being of the very essence of neutrality. But it was at the same time no less distinctly laid down in a cause before a great tribunal, and in the language of a distinguished judge, “That commerce on the part of a neutral with a belligerent constituted no offence against the law of nations; and that even when armed vessels or munitions of war were the subject of sale, the neutral shipper of such articles was not, in the absence of specific treaty engagements, an offender against his own sovereign, or liable to be punished by the municipal laws of his own country. The transaction was a commercial adventure which no nation was bound to prohibit, and which only exposed the persons engaged in it to the penalty of confiscation.”‡ And this doctrine, in support

\* *The Maria*, 1. Rob. 340.

† 4 Rob. 11. 13 East, 332. And see Duer's *Marine Insurance*, vol. I. p. 594, *et seq.*

‡ By Story, J., in the *Santissima Trinidad*, 7 Wheaton's *Inter. Law*, p. 283. The same doctrine was upheld in our courts recently by Westbury, C., in *ex parte "Chavasse"* *jurist N.S.*, May 20, 1865; and by Dr. Lushington in “the *Helen*,” *ibid.*, Dec. 20, 1865. See, on the other hand, Phillimore, *Inter. Law*, vol. III., p. 321, *et seq.*, who differs from Judge Story on the point whether the sale of the munitions of war to a belligerent in the territory of a neutral is illegal; such a transaction he holds to be contrary to the principles of eternal justice, and the reason of the

of which may be cited almost every authority of weight on questions of international law, has recently been the subject of investigation in the courts of this country, where it has received implicit confirmation.

So that we have here one cardinal rule, namely, that the neutral may trade with a belligerent, subject to the incidents of capture and confiscation, of which as a matter of adventure he takes his chance. On the other hand another conflicting rule obtains, which is at least of equal force, that a neutral shall not interfere in the war in any way whatever. Trade with an enemy in like manner is forbidden to a subject of a State at war; and this doctrine has in its turn received extensive qualification by the system of licenses under which such a trade is openly permitted. These principles present a direct conflict of law. The exertions indeed of modern jurisprudents and statesmen have in recent times been directed to reconcile them, and to lessen as far as may be the severity of their incidence on the neutral trader, and decisions of courts and acts of governments have advanced so far in the adjustment of the questions of commerce with an enemy or a belligerent, as to suffer it, as we have seen, to be carried on *sub modo*, that is to say, subject to the rights of capture and confiscation if contraband. Thus a proceeding which in one view of it cannot but be regarded as a marine tort of the gravest kind, is on the other hand declared to be at the same moment a legitimate transaction of commercial adventure, and one clothed with its proper contractual obligations. "In fact," as observed by Lord Westbury, in a recent case, "the act of the neutral trader in transporting the munitions of war to the belligerent country is quite lawful, and the act of the other bellige-

thing, and that in principle there is no difference between the permission to a neutral to sell warlike implements, and that of allowing the enlistment of troops; both being in his judgment alike inconsistent with the duties of neutrality. Of the superior morality of this view of the case, and the greater advantage that would ensue from its strict observance to the avoidance of international complications, there cannot, it would appear, be any doubt.



rent in seizing and appropriating the contraband articles is equally lawful. Their conflicting rights are co-existent, and the right of one party does not render the act of the other party wrongful or illegal.”\*

But this is not the only exception which has broken in upon the rule, that trade with an enemy or belligerent on the part of subjects of a State at war, or of a neutral State, in articles contraband or of use in war, is illegal. The doctrine of domicile as governing the allegiance of private persons, and determining their *status* as a matter of public law, has had its influence in assisting private persons to escape from the rigour of the rule as laid down by Sir W. Scott, for under the law of nations the national character of a person as neutral or enemy is determined by that of his domicile; but yet the property of a person may acquire a hostile or neutral character, as the case may be, wholly distinct from, and independent of, the nationality that springs from personal residence. “There is,” to use the expression of a great judge, “a traffic which stamps a national character on an individual independent of that national character which personal residence may give him.” † And this doctrine which dissociates the private character of a trader from the artificial personality, so to speak, which springs from commerce, enabling him at the same time to fill two characters, and by insisting on the immunity attaching to one to escape from the obligations and disabilities incident to the other, cannot but have, and has had, a wide operation in preserving for private property exemption from the consequences of war. It supplies another instance of that struggling of an ever-growing commerce to get quit of artificial hindrances to its expansion, and of its refusal to be bound by *dicta* which belong to a system of public law which seems destined soon to receive large modifications, if not wholly to disappear; a system which owes its acceptance amongst English jurists

\* *Ex parte* “Chavasse,” Jurist, N.S., May 24, 1868.

† By Story, J., in the *San José Indiana*, 2 Gall, Rep., 268.

more, probably, to the character and influence of one distinguished judge than to any principle which can be relied on as a fixed element in jurisprudence.\*

The truth is that the proposition, that there cannot be at the same time a war for arms and a peace for commerce, a condition of things towards which the necessities of modern transactions are surely gravitating and forcing upon the acceptance of statesmen and jurists, was regarded with much distaste by the school of civilians of which Sir William Scott was the chief. The whole course of Admiralty decision, in cases where the rights of belligerents and those of neutral States conflicted, shows that they came with averted eyes to any concession which would serve to give the *status* of a neutral power a more defined or favourable place in the public law of nations. And certainly there can be but little doubt in the mind of any one who has investigated the subject, that the problem, how to give effect in the administration of international law to the growing power of commerce, and to assist in placing neutrals or private traders in the position which they would assert for themselves, so as to surround their contracts with the necessary legal sanctions, presents difficulties of no common kind. For example, one principle on which this doctrine of the incompatibility of war and commerce has been made to rest is, to use the language of Sir W. Scott, the total inability to sustain any contract by an appeal to the tribunals of one belligerent State on the part of the subjects of the other; and, in giving judgment on a case in which the point arose, † he goes on to remark that “the *peculiar law*” of our own country applies this principle, which he admits to be “less politic,” with great rigour, an observation which may without injustice be extended to all cases in which that law had occasion to deal with the rights of neutral countries or

\* For example—the rule of war of 1756, forbidding all commerce with the colonies of the enemy, has now taken its place amongst those principles of public law which have fallen into desuetude.

The Hoop, 1 Rob. Rep., 201.

the property of private persons, in connection with contracts springing directly or indirectly out of a state of war. \* But in the received view of his position the individual alien enemy had, as the phrase went, no *persona standi in judicio*; he was totally *exlex*; and as his contracts could not by any process known to the law be enforced, they were held not to be, in one view of them, legal contracts at all.

This question has hitherto been treated as one of law resting on the assumption of the identification of the individual with the State, and the consequent resulting responsibility. But, in truth, the theory, however convenient for purposes of government, seems wholly artificial. Is there in principle any such identification? The right of commerce, for instance, of that trade which consists in the free application of individual labour and enterprise to the supply of the necessities of mankind, and the free circulation of wealth, has it in its own nature anything in common with acts of governments based, perhaps, on treaty obligations more or less obscure, and the violation of which involve considerations rather of polity than of morals? Or can it be derived from the State, which, however it may prescribe the conditions under which trade can be carried on, cannot give that trade existence, or do much more than remove obstacles in the way of its growth and extension? And so again—an inquiry which is collateral with the preceding—is there in the reason of the thing any ground for the distinction which, as a point in the law of nations, has been so much laboured, and which lies at the root of the modern

\* "The great authority, the penetrating sagacity, and the inimitable style, of Lord Stowell, who filled the chair of the High Court of Admiralty in England during the whole of the last great European struggle, have served to vindicate the system of law which he administered, and even to palliate acts of cruelty which a judge of inferior reputation might have hesitated to enforce. But the jurisprudence of international courts would fail to perform its high duties in regulating upon legal principles the differences of empires, if it were not so guided and administered as to meet the wants of a progressive age, and to apply to these delicate questions the more humane and temperate maxims which have happily prevailed in every other branch of public affairs."—*Edinburgh Review*, July, 1854.

theory of the law of prize, between goods the property of private persons on shore and the same property when in the form of a cargo afloat? How can these so differ in principle as to justify the capture and confiscation of the latter, or the loss arising from its being detained and sent into port for adjudication, while property of the former class is wholly exempt from a procedure so disastrous, or at best vexatious? If the plunder of an industrious merchant be thought disgraceful on land, why should the proceeding be regarded with greater favour because it takes place at sea? \*

"That an individual citizen," observes Sir Travers Twiss, "of a neutral State should be liable to be treated as an adherent of a belligerent power, whilst the nation itself of which he is a member maintains neutrality, presents no difficulty." † This statement of the law is no doubt correct, but the converse of the proposition, which if adopted would give extension to private commerce, has not as yet been admitted. For the private trader, a member of a State at war, is under the existing law of nations identified with the State of which he is a citizen, to the extent of subjecting his property sailing under its flag to capture and confiscation. If there is a separation of interests in the one case for the sake of the belligerent, why not in the other for the sake of the trader?

These are some of the considerations which embarrass the treatment of this difficult and interesting subject. Two forces are in antagonism—War and Trade; how can these be reconciled, or do they admit of reconciliation? Amidst,

\* "Private property," says Wheaton, "is exempt from confiscation with the exception of such as may become booty in special cases, when taken from enemies in the field, or in besieged towns, and of military contributions levied upon the inhabitants of the hostile territory." *Inst. Law*, p. 420; and see Twiss, "*Law of Nations*," *Time of War*, pp. 108, 135; as to the refined distinction, which, however, is well settled, between shipping found in an enemy's ports, and which is liable to seizure or confiscation, and *cargoes*, the property of private persons, which are on all hands exempt from such consequences.

† "*Law of Nations*," *Time of War*, p. 435.

however, the conflict of opinion on the question, one fact presents itself which cannot be set aside, and that is, that while war is unnecessary, and, in theory at least, may be regarded as capable of indefinite mitigation, and ultimately of ceasing to exist altogether, the necessities of trade have increased, are still increasing, and with every hour's growth in progress and civilization demand room for expansion and development. If, therefore, in any system of law two principles are found opposed, both of which are at the same time the subject of judicial recognition, as having certain rights attaching to them capable of being enforced, but of which one is in harmony with the advance of nations, while all the efforts of society are directed to abolish the other, it is not difficult to see which of these forces will be in the ascendant, and suffer in its advance no opposing rule, whether of the law of nations, or in any system of jurisprudence worth the name, to occupy any place. It is, in the meantime, obvious that the position in which this question is placed by contradictions so palpable, finds international law comparatively powerless as a means of pacification, just at the point where its intervention as an efficient method of solving any difficulties that may arise in the intercourse of nations is most needed. Such a state of things involves this consequence amongst others, that it is opposed to the observance of a true neutrality in any real sense of the word, and it may also lead, in the present state of the growth of manufacture and transportation of commodities, united with the increased legislative favour shown to trade, to further complications which it is eminently desirable should be averted in time of peace before their influence on property, national as well as individual, is felt during a state of war.

It remains to notice one aspect of this question upon which much stress has been laid by those civilians who wish to see the existing rule on this subject maintained or even extended as a principle of public law bearing on the intercourse of nations. During the Crimean war the

rule of intercourse with the enemy was much relaxed, not only by England but by France and Russia. The Order in Council of April 15, 1854, permitted British subjects to trade freely to Russian ports not blockaded, in neutral vessels, and in articles which were not contraband of war, but not in British ships.\* The French orders were to the same effect. The Russian Declaration of April 19, permits French and English goods, the property of French and English citizens, to be imported into Russia in neutral vessels.† The French and Russian Governments also allowed private communications, not contraband in their nature, to be exchanged between their subjects by telegraph.‡

Upon these Orders in Council, which it is obvious indicate a marked advance in the removal of the disabilities which in time of war pressed so heavily upon neutral States, it has been observed by a learned writer that they must be regarded as special regulations adopted from reasons of policy applicable to that war, and as to which each nation must in any future war judge for itself. This is inferred chiefly from the subject not having been one selected for deliberation by the parties to the Declaration of Paris in 1856. But, in truth, when once a step of this kind in national progress is made in advance retrogression is impossible. The concession made takes rank amongst the allowed principles of public law, and it may well have been thought by the diplomatists assembled at the congress that the question was one which might safely be left for solution to more just views and the increasing necessities of commerce. The position of the case is this:—on one side is the view, now so generally adopted both by private merchants and corporate bodies, that, as stated by Mr. Dana,§ all trade should be left free, and that the opera-

\* *London Gazette*, April 18, 1854.

† *London Gazette*, May 2, 1854.

‡ *Courrier des Etats Unis*, 23 July, 1855.

§ Wheaton's International Law, by Dana, 401.

tions of war should be confined to government property and persons and vessels in belligerent employment; an opinion which is supported by the argument that the commerce of such a country as England is too vast to be protected by her navy, and that she would lose more than she would gain in a contest of captures with any power; and that if direct trade with enemies was not permitted the only consequence would be that neutrals would carry the cargoes, and the belligerents would not be crippled in commerce or resources except as to the employment of their own ships and sailors; a result which would not operate to the advantage of England. To this may be added that such an extension of private rights as is here advocated would render privateering unnecessary. The reasoning in support of the opposite view rests on that theory of international law which identifies each citizen with the policy of his government in war; a theory which may be termed as that of association. On this side of the controversy may be ranged the authorities of Mr. Justice Story in America, who, in a well-known case,\* observes on the inconsistency of permitting an American citizen to carve out for himself a neutrality on the ocean when his country is at war, and of allowing an engagement to be legal which confirms in him the temptation or necessity of deeming his personal interests at variance with those of his government. And to a like effect is the opinion of Sir R. Palmer, in England, who has stated in so many words that a political war and a commercial peace are inconsistent.

This latter view has the support also of Professor Dana, one of the most learned of American publicists, who, in his edition of Wheaton's International Law thus expresses himself:—

“The truth is, the most humane, and often the most efficient part of war, is that which consists in stopping the commerce and

\* The “Julia,” VIII., Cranchi, Rep. p. 180.

cutting off the national resources of the enemy. . . . Driving his general commerce from the sea, and blockading his ports to keep neutral commerce from him, must diminish his resources and tend to coerce him. It is the least objectionable part of war. It takes no lives, sheds no blood, imperils no households, has its field on the ocean which is a common highway, and deals only with persons and property voluntarily embarked in the chances of war for the purpose of gain, and with the protection of insurance. War is not a game of strength between armies or fleets, nor a competition to kill most men and sink the most vessels, but a grand national appeal to force to secure an object deemed essential when every other appeal has failed."\* And again — "Nations should have it in their power to coerce the body politic they are at war with, by a coercion applied to all its citizens, in all their interests, and to identify the private interests of each of their own subjects with the national fortunes in the war."

This reasoning is not without its force, and the argument has lost none of its value from the way in which it has been stated by the learned author. We may well hesitate, however, before we admit it conclusive upon the important point of international law which it is employed to enforce. On all hands it is conceded that the exercise of the *summun jus* of war must be modified by a regard either to treaty stipulations, or the higher obligation of observing good faith on the part of nations engaged in a state of war. It is, for example, the allowed right of a belligerent to confiscate the enemy's property found within its ports on the breaking out of war. The absolute *right* to convert such property is inherent in the sovereign power of every State. But the usage of nations, and the principle of reciprocity, imposes a limitation upon the exercise of that right which no people is at liberty to set at nought. And so with concessions to neutral rights and in favour of private property on the ocean. It has been urged that to yield

\* Dana's Wheaton, note, p. 401.



on this point would be impolitic, inasmuch as by identifying each individual citizen for the purposes of war with the government of which he is a member, he becomes, it is said, more directly interested in bringing the hostilities from which he suffers to a rapid conclusion. But, in the first place, this reasoning seems wholly opposed to the principle under which large concessions—which cannot be now recalled—have been made to private commerce, and also to be at variance with the more equitable spirit in which implied international obligations have, in modern times, been interpreted. The argument pushed to its logical extreme must be, that *all* mitigation of the evils of war is impolitic, because by lessening the intensity you prolong the duration of hostilities; a view which, if followed to its legitimate consequences, would simply forbid any interference whatever with the extreme exercise of the rights of war, or any efforts to soften its rigour.

If the present rules and practice obtain, and this country engages in war with a maritime people, as for instance the Americans, the first consequence would be that the entire carrying trade would pass into the hands of a neutral State. But there would be a further result. It is on all hands allowed to be desirable, and it was one of the points considered at the Congress of Paris in 1856, that privateering should be abolished. The matter fell through at the time from the plenipotentiaries being unwilling to concede the further point (insisted upon by the United States as a condition precedent) that private property at sea should be exempt from capture. Now, to a nation who has no regular, or but a small naval force, privateers fitted out under letters of marque constitute a most legitimate and valuable part of the military marine. They are the means of rendering the mercantile seafaring classes of the population directly available for purposes of war; and bear the same relation to national or public ships that volunteer troops on land have to the regular army. The employment

of such vessels is therefore the only means whereby a State which does not maintain an armed fleet during peace can hope to contend against a great naval power during war. At the same time this force is from its very nature exposed to much irregularity, and is liable to abuses from which, owing to their more strictly defined character, public vessels of war are free. Its abolition therefore, and the confining of naval operations to ships regularly fitted out and commissioned, would have the result of abridging the duration of war, of rendering needless the vexatious and practically useless right of search, and avoiding those complications and that injury to commerce which is so likely to arise from the employment of an irregular and imperfectly disciplined marine. Under no circumstances, however, can an approach be made to this result save by rendering the use of such vessels almost or entirely needless, by surrounding the property of private persons at sea, wherever found and by whomsoever carried, with a protection which should be enforced as a recognised rule of public law and usage of nations.

In fine, the tendency of modern opinions on this interesting question, certainly amongst continental and American jurists, is to confine the operations of war, as on land to armed and disciplined troops, so at sea to the public commissioned ships of the belligerents. On the other hand, in the interests as well of humanity as of trade, the persons and property of citizens who are not identified with the cause of war otherwise than by being subjects of the powers engaged, should be as much as possible exempt. By a process of reasoning, similar to that which in the interests of neutral powers severs the cargo from the ship in which it is conveyed, it is with justice argued that the property of commercial persons and bodies corporate should be subject to no other burdens as incident to a state of war than the liability to additional taxation; or, if goods are directly in transit to a belligerent port, or are openly contraband, or the trade is

of a hostile character, such as conveying signals between fleets, and conveying hostile persons or papers, to capture and confiscation as prize of war. The maxims still in theory binding, that there "cannot be at once a war for arms and a peace for commerce," and that each individual citizen is an enemy of the country with which the State of which he is a subject is at war, will gradually, like the rule known as the rule of war, of 1756, forbidding a neutral to trade between a parent State and its colonies, fall into desuetude, and be no longer spoken of by civilians, or enforced by international tribunals, as binding principles of international law.

---

#### ART. IV.—THE LAND QUESTION.

*The Law of the Farm.* By H. H. DIXON, Esq., Barrister-at-Law. London: Stevens and Sons. 1863.

*The History of Land Tenure in England and Ireland.* By W. F. FINLASON, Esq., Barrister-at-Law, Editor of "Reeve's History of the English Law." London: Stevens and Haynes. 1870.

PROBABLY the most interesting aspect of the Irish Land Question, at least to English readers, is its bearing on the land question in England.

As a writer in the *Times* observed:—

"Mr. Goldwin Smith concludes one of the best of his works—the essay on 'Irish History and Irish Character'—with a calculation of the advantages to be derived by England from its union with a country less settled than itself, and among these possible benefits he enumerates the origination of wholesome reforms. Englishmen are, in comparison with Irishmen, so well off and so fairly satisfied with their institutions and their progress that they might be disposed, as far as they themselves were concerned, to neglect desirable improve-

ments; whereas in Ireland the necessity for these improvements being more pressing and manifest would force the subjects forward for discussion, and then the discussion would lead to the establishment of principles applicable with advantage to the rest of the empire. Just so; as Mr. Goldwin Smith also remarked, in Ireland the relations of landlord and tenant have first been made the subject of debate."

This accounts for the intense interest taken in the subject in this country, so soon as it was once ascertained that the Government really intended to deal with it; English landlords of the highest rank and position—and even peers of the realm—immediately addressed themselves to it in earnest, and the result of discussion was most remarkable. As the *Spectator* observed:—

"There is something perfectly astonishing in the progress made by the Irish Land Question within the last few months. It is almost too great to be trustworthy. Years ago, when we suggested the principle of a perpetual settlement,—such a settlement as that of the land in Bengal,—as the true remedy, we did not then say, and do not now say, for the *economical*, but for the *political* miseries of Ireland, our suggestion was treated in the press as that of a political eccentricity not far removed from lunacy. When Mr. John Stuart Mill took up a very similar ground two years ago, and published his celebrated pamphlet on the Irish Land Question, he was not very much more favourably received. Even the extreme Radicals treated his proposal as monstrous, and had he made in Parliament a motion founded on his pamphlet, it is not likely that he would have got three English Members to follow him into the lobby, and not many Irish. Well, at the present moment, a perpetual settlement in Ireland, *i.e.*, fixity of tenure for the tenant in all cases except that of non-payment of rent, is so far from being a mere chimera, that there is at present *no party* in Ireland, not even the ultra-Conservative, which does not contain a number of strong advocates for it, while the landlords can scarcely get any newspaper to take up their side, or to brand the new doctrine as one of confiscation." — *Spectator*, September 25.

Mr. Charles Buxton, in the first of a series of useful and interesting letters on the subject, made some similar remarks. The progress of the question, he said, in the course of a few months, had been astounding. It was agreed, on all hands, that there must be security of tenure; compensation would no longer satisfy the Irish tenant. This was not surprising. A quarter of a century ago the Devon Land Commission reported that the tenant was entitled to compensation, and repeated measures for the purpose of securing it have been prepared, and more or less approved; even a Conservative Government brought in a Bill for *retrospective* compensation. Yet, after a quarter of a century of abortive attempts at legislation, the Irish tenants were told at last by the imperial Legislature that they had nothing to expect from legislation, and that they must take care and provide contracts, and not only so, but *contracts in writing*! What was the effect of Mr. Cardwell's Acts and Lord Clanricarde's Bill. Contracts in writing! As if it mattered a straw whether the contracts were in writing or not, if their terms were oppressive. Or, as if the Irish tenant would not be only too happy to have fair and equitable contracts if he could get them. And as if the whole evil was not that he was unable to get them, because in an unequal position as compared with his landlord. That was in effect just what the Devon Land Commission reported twenty-five years ago. And, in the face of this, to tell the Irish tenant to get good contracts, and have them in writing, was an insufferable and offensive insult. It was adding insult to injury in the most irritating and exasperating form.

Of course this could not satisfy a Liberal Government, and Lord Granville, on their part, declared that they were not as yet prepared to legislate on the subject. It was full time. No one can doubt that the state of the land question was the fruitful cause of trouble and agrarian outrage. Thus the *Times* spoke of one well-known case:—

“Let us take the example of Mr. Scully, of Ballycohey. It is such men that have compelled the State to legislate on the social condition

of Ireland. Mr. Scully was the owner of lands held by a certain number of tenants. He gave them notice that, unless they assented to contracts of tenancy, giving him the power to oust them at a moment's notice, they must immediately yield possession. They felt themselves powerless in the presence of their landlord, they knew there were others ready to become tenants, they knew they had no place to which to turn if they quitted Ballycohey, and they organised an attempt to murder Mr. Scully when he proceeded to serve his notices upon them. Yet Mr. Scully acted strictly within his legal right. He said, as any landlord may say, 'Agree to my terms, however fantastic, capricious, inequitable they may be, or quit.'

Nor was this at all an isolated instance. Other and similar cases have, from time to time, occurred, which read the same dreadful lesson. There are two reported in the *Times*, and stated and commented on by the *Spectator*.

"Two such cases of agrarian murder have been elucidated in the papers of this week,—one, the case of '*Clarke v. Knox*' by the *Times*' Commissioner in Ireland,—a case in which the unfortunate tenants were served with notices of ejectment by a proprietor wishing to sell because the proprietor wishing to buy would not buy except free from all sub-tenancies. They were assured that these notices were only formal, and then directly the transaction had been completed, they found, to their cost, that they were really to be ejected, in spite of all these assurances,—though the agent was so shocked at the transaction that he threw the whole onus of it on the proprietors, and declared that if the tenants were turned out, it would be an 'unparalleled outrage.' The other case is almost equally illustrative of the true cause of the hatred felt for the law, and the sympathy felt with vindictive murderers who have wreaked their vengeance on those who chose to enforce the law. It is the case of Mr. Hunter's murder in Mayo, the history of which has been lucidly told in the *Echo*. In that case, Mr. Hunter, a Scotchman, had taken the lease of an estate on which rights of turf-cutting had been held from time immemorial by a certain number of peasants, but the reserve of these rights had, by an oversight, been omitted from the lease. The grantor of the lease at first himself paid the lessee,—Mr. Hunter,—

enough,—it was only 3*l.* a year,—to cover these poor persons' rights, as the reserve of their privilege had been left out owing to his own negligence. But when this gentleman sold his estate to a new proprietor, Mr. Hunter raised his demand from 3*l.* a year to 10*l.* a year, which the new proprietor was unwilling to pay; and accordingly Mr. Hunter brought a suit against one of the peasants who cut turf for trespass, and the man was fined 5*s.* and charged 48*l.* for costs,—the decision going against him through some defect, it is supposed, in the getting-up of the poor man's case. The peasants had regarded it as what, in fact, it was, only a dispute between the lessee and the proprietor—their rights having been so long unquestioned—and when one of them was suddenly fined 48*l.* costs and his crops seized by Mr. Hunter by way of distress, the rage inspired by the act was so great that Mr. Hunter was murdered."

And then the *Spectator* observed, commenting upon these cases :—

"These two cases are perfect sample cases of the wrongs which give rise to these fearful agrarian crimes, and to the still more dangerous hatred of the law, as a law deliberately unjust to the peasant, and therefore earning for such revenges the sympathy of the people. Now, what seems perfectly clear is, that to undermine this spirit, to turn the feeling of the peasantry towards the law into one of respect for a just law which protects and never robs them, it is absolutely essential that tenancies-at-will in Ireland should virtually cease; that there should be a fixed minimum term, at least, within which no tenant should be dispossessed, except for non-payment of the rent agreed upon—that the presumption should be on the side of the tenants, at least for a fixed time, and not on the side of the owner.

"And, in point of fact, the more evidence accumulates on the subject, the more certain it becomes that the root of the *political* disease of Ireland—by which we mean the root of that popular spirit which excuses agrarian crime and regards the Government as its natural enemy—is the shamefully insecure position of a people who see themselves always exposed to the danger of being suddenly and arbitrarily deprived either of the fruits of their own hard-earned labour, or of customary rights which by long usage they

have learned fairly enough to regard as their own. There are very few agrarian murders in Ireland which, when carefully inquired into, do not turn out to be due to some such flagrantly unjust dispossession. And yet there are numbers of such flagrantly unjust dispossessions which do not ever lead to murder, and of which consequently we hardly hear in England."

Nor could it be deemed any adequate answer to such cases that they were comparatively *rare*: for at all events they did constantly occur, and that often enough to infuse an element of constant apprehension and insecurity into the whole relation of landlord and tenant. As a writer in the *Times* observed:—

"The real grievance, as we have so often pointed out, is the general insecurity of tenure—an insecurity far greater, in fact, than prevails in this country, and infinitely more baleful in its influence, inasmuch as the population which suffers under it has no other industrial resource but agriculture. It is vain to speak of this grievance as 'sentimental,' because evictions are now rare, except for non-payment of rent. Arbitrary evictions may now be rare, though not so rare as many suppose, but it is a very few years since they were common, and not long since thousands of Irish homes were annually desolated by clearances, not without excuse on economical grounds, but morally indefensible. But let us assume that arbitrary evictions are and always have been rare; that is, that not above a few hundred families have been driven in each year to the workhouse by the march of agricultural improvement. What follows? Are not agrarian murders rarer still, even in the very worst years, and yet do not ten or twenty such murders spread an universal sense of insecurity? Is it, then, so unreasonable that a number of arbitrary evictions which looks small when compared with the half-million of Irish tenants, should nevertheless be quite sufficient to make the great mass of Irish tenants feel as if a sword were hanging over them? Nor is this by any means the whole case. Trifling as the proportion of arbitrary evictions may be, the number of notices to quit served every half-year is known to be enormous, and is probably increasing. In a great majority of instances, it is true, no action is taken or intended to be taken upon them, and the tenant may rest tolerably



safe against disturbance. They are served, in fact, as a mere formality, the motive being to keep alive the landlord's right of resuming possession, and to bar, if possible, the operation of any Land Bill which Parliament may pass. But how can such a practice fail to bring home to a tenant's mind his absolute dependence on the will of an individual, and how can we marvel at his passionate longing for a practical security of tenure, which his ill-advised counsellors have taught him to call "fixity of tenure?" It is possible, we believe, without infringing the laws of political economy or equity in the slightest degree, to quiet for ever this sense of insecurity."—*Times*, November 5.

It soon became recognised in England and Ireland that there must be security for compensation, and also against arbitrary eviction, for the two things were correlative, and the one without the other would be of little avail. In a very short space of time it was settled by public opinion that there must be an end to arbitrary eviction. And, as the *Times* truly observed:—

"There are certain phrases which once spoken exhibit a revelation of the public mind from which there can be no recall. When the words 'Household Suffrage,' for example, were used by Sir Roundell Palmer as indicating the only sound limit of Electoral Reform, it was felt at once that it would be impossible to stop short of that line. In the same way the phrase, 'No capricious eviction' has been pronounced, and has excited an echo. The days of 'capricious eviction' are passed by. Mr. Buxton quotes Lord Castlerosse's declaration—'The occupier of the soil has a right to be protected from arbitrary or capricious eviction,'—words repeated by Lord Fingall, and adopted in substance by the sons of the late Lord Lieutenant, the Duke of Abercorn—and concludes that the period of the uncontrolled subjection of the tenant to his landlord is over."

And it is most interesting to observe the gradual process of development of principles by which men were driven as to some great change in *tenure*. An English peer, who is an Irish landlord, Lord Portsmouth, actually avowed at a public

meeting, that tenants' improvements often amounted almost to the value of the fee simple:—

“He denied the statements of a certain class of speakers and writers, who spoke of Irish tenants providing their own buildings as the exception and not the rule. As an Irish proprietor he could say that there were few instances in which the buildings were provided by the landlord; indeed, a friend of his who had resided in Ireland for a number of years had said that he could count those cases on his fingers. One objection to assimilating Irish tenure to English tenure was that tenants often laid out such a large sum of money on their estates that it would cost a sum nearly equal to the fee simple to buy them out if the landlord wished his land to change hands. That would not pay.”

It would not pay for the landlord to compensate at such a rate, no doubt; neither would it pay for the tenant to have no compensation, and to have to pay for his own improvements either in rent or in purchase money. The only alternative would be a *perpetual tenancy*. And accordingly it was soon admitted that this was a natural result. The most important observers—English landlords, not likely to be too favourable to tenants—admitted something anomalous in the condition of the tenant in Ireland. Thus, Mr. Walter said:—

“You must be quite aware that the relations between landlord and tenant in Ireland are as different as anything possibly can be from the relations which exist between landlord and tenant in England. I am quite certain that if it were possible for the relations between landlord and tenant to be in England what they are in Ireland, nothing could preserve the harmony and good feeling which here exist, and have never been more conspicuous than at the present moment. The difference, in a few words, is this: in England a tenant takes a furnished house, and all the landlord expects is that he will keep it in as good condition as he took it. But in Ireland the state of things is different. As a general rule the tenant does everything; he builds the very house he occupies, or if he does not build it he pays some outgoing tenant who has. The landlord does not provide a single shed or building, and it is an understood thing that

the tenant does everything except provide the land itself. It stands to reason that if a tenant takes an unfurnished farm, without any building or drainage, and with nothing but the naked ground; if he has to put up buildings and provide all other agricultural furniture himself, and is then liable to be turned out at a moment's notice, his furniture seized without compensation, that such a transaction fully deserves the epithet which Lord Clarendon the other day applied to it, of a 'felonious act' on the part of the landlord. The state of things I have described has brought about the miserable state of the relations existing between landlord and tenant in Ireland. They have got a thoroughly bad system from beginning to end. The best thing that could happen would be for the system existing in England to be adopted in Ireland. It would be better both for landlord and tenant that the farm should be let with all the permanent improvements done by the landlord, and nothing but the ordinary operations of agriculture performed by the tenant. If it be impossible to get out of the present system—and I conceive that it will be impossible for a considerable time to come—the next best thing to do is to make such equitable arrangements as the case requires during the interval which must elapse, and I believe there will be no real difficulty in effecting it if parties on both sides of the House are prepared to do what is just and equitable—if the Irish landlords recognise under the present grave circumstances what is their duty, and Irish tenants are prepared to be content with what is just and equitable, and not set up preposterous claims, which no English landlord would grant for one moment."

And such opinions were put forth by Mr. Charles Buxton in his admirable letters on the subject.

Even those English landlords who opposed any notion of fixity of tenure, dreading the application of it to England, opposed it on the ground that in this country it was not required, and admitted the right of the tenant to compensation. Thus, at a Gloucestershire meeting, Earl Bathurst said :—

"The landowners were determined to do their duty. They were quite alive to the fact that property had its duties as well as its rights, and if they failed in the performance of those duties it would be for want of means to carry them out according to the requirements

of the public. He contended that in the face of the present good understanding between landlord and tenant, the interposition of Parliament—as far as this country was concerned—was not required. Tenants had their rights, landlords had their rights, and labourers had their rights; but they were the rights which the law gave them and no more. He ridiculed the idea that after the expiration of a lease there was a fixity of tenure. He agreed that the tenant had a right to demand compensation for improvements, indeed, he held such to be an equitable right."

And, as Mr. Dixon shows in his book, in almost all the counties of England local customs secure such compensation to the tenant. It is otherwise in Ireland as a matter of general law or general custom. It is only so settled in Ulster, by virtue of a local custom (which however throws the burden of compensation on the *incoming tenant* and not on the landlord), or upon the estates of good landlords, like Lord Dufferin or Lord Bessborough, who either give leases or compensation. The Earl of Bessborough at a public meeting said :—

"We every day see something connected with the land question brought forward, and sometimes schemes are introduced which make me doubt if I shall be here for the rest of my natural life. If I were obliged to leave I think I should be regretted. Well, whatever change does take place, I trust that nothing will occur to interfere with that cordiality and friendly union that exists here, and which, I trust, will continue to exist to the close of our lives. I have endeavoured to do what I considered to be my duty in the position in which I am placed, and I have been ever met by my tenantry in a way that left nothing to be desired. I have found them industrious and reasonable, ready always to improve, and showing by their acts that they had confidence in me. I have tried to make every individual see that the capital which he puts into his farm, whether it was money or labour, which is the poor man's capital, would be always protected, and that he would reap the full benefit of it. That being the case, I do not believe that in this district any desire exists for great and radical changes. But this I, for one, will say, that if

by surrendering any of those rights and privileges, which might be misused, the peace and prosperity of other parts of the country will be secured, I shall readily do so. I do not believe that the tenantry of Ireland in general have the slightest wish to get rid of those who are their friends, as I consider a good landlord to be to his tenantry. This I will say, that I firmly believe that by living together, as my tenants and I have done, we have shown to the world that the interests of landlord and tenant are identical, not, as frequently represented, opposite and hostile."

And no doubt it is so, and has always been so, where there are such landlords. And, for the most part, there are such landlords in England—men like Lord Grey, Lord Portman, or Mr. Sturt, all mentioned by Mr. Dixon as giving either leases or compensation; and if there were such landlords always or usually in Ireland—men like Lord Athlumney, for instance—there would be no land question. But unhappily it is otherwise, chiefly because, as Mr. Bruce, the Home Secretary, said, "Six-sevenths of the land in Ireland is owned by Protestants."

The *Times*, in one of its excellent articles, said :—

"It is admitted that many landlords believe sincerely that the power of summary eviction, though a power seldom to be exercised, is a trust confided to them for the good, not only of their own estates, but of their ignorant tenantry and the community at large. Probably few abuse it grossly, and most certainly the impatience of it among Irish tenants is mingled with revolutionary ideas, which, if adopted, must lead to anarchy. But this does not alter the fact, which no statesman can ignore, that equitable claims have been developed by this very shortsighted policy of landlords. A lease puts an end to all notion of title by virtue of occupation; but a tenancy-at-will, descending from father to son, and fortified by the expenditure of labour and money, with the landlord's assent, is the parent of expectations which gravitate towards fixity of tenure."

It was now sought to satisfy the tenantry of Ireland by the establishment of what is called Ulster tenant-right, by

which the *incoming tenant* pays for everything and the landlord pays nothing. The truth is, that even in Ulster the custom has far from carried out what was originally contemplated and intended by the authors of the settlement. An able Irish organ, the *Northern Whig*, observed, that of the tenant custom of Ulster, the origin of it is not so easy to determine as may be supposed. A number of tenant-farmers, who were recently questioned on the subject, gave different answers, but no satisfactory explanation, from which the *Whig* concludes that it was not that simple and logical process which some people imagine, and then observes :—

“No single system was rigorously carried out. There can be no doubt, however, as many of the Patent Rolls of James I. testify, that great estates were granted to favoured persons on the condition that they should give their tenants a real interest in the soil; that in general tenants-at-will were not recognised, and that a fair security of tenure to the farmers was one of the conditions on which different lands were granted to the landlords. It is obvious enough that in those rude times English and Scotch colonists would not have been induced to cross the sea and incur all the dangers of undertaking to cultivate a barbarous and hostile country without having some security that they and their children who should come after them would enjoy the rewards of their industry. They came over here to sow the seed. They fully expected that they and their descendants should reap the harvest. And this was the intention of the Government. This is obvious from existing documents. Some tenant-farmers still living have been told of a time when their ancestors cultivated the land with the implements of husbandry in their hands and guns hung at their backs. The landlords certainly felt it to be their interest to promote security of tenure.”

The writer argues that if Ulster tenant-right is to be made the basis of legislation, the custom will have to become a law, and a very strict law. A very liberal valuation will have to be placed on claims for unexhausted improvements. Sacrifices must be made by the landlord in the interest of peace and contentment. The mere limited recognition of a tenant-right

of 5*l.* an acre, as in the Bill of three years ago, "could not satisfy men who have a just claim to a much higher rate."

But what basis for legislation could be found in a custom which varies so much that, as the *Times'* Commissioner says, in some places it is five years' and in others twenty years' purchase. Moreover, in a twenty years' purchase how great an approach is made towards fixity of tenure! Twenty years' purchase would be the price of the fee simple. Thus we see that, as Lord Portsmouth observed, such compensation would not pay, for the landlord would prefer perpetual tenancy, with periodical revaluations.

The truth is, that to the most intelligent observers it has appeared that in the great matter of tenure of land, the general law is at variance with, or does not at all events sustain, the customary right as recognised in fact, so that it is felt that the customary right, not based upon any certain general law, rests on an unsafe and uncertain foundation. Thus the *Times'* Correspondent observed:—"In the great matter of landed tenure, law, in theory, is at issue with fact and right in Ulster, as in the rest of Ireland. Here, as in the other parts of the island, law declares that a landlord is an absolute owner, though his estate may be subject to claims which morally abridge his rights extremely, and, in the face of the strongest custom, it will sanction his abolition of those claims, and will even give him facilities for the purpose. Abstractedly, therefore, it would appear as if the tenant of the North were in as bad a plight as his Southern fellow—nay, in a worse plight, inasmuch as his tenant-right often far exceeds in value any equity which may belong to the other. We know, however, that, in fact, the difference between the two is immense; that the tenant of Ulster usually feels himself secure and entitled to a real property in his holding, while the tenant of the South has no such conviction, and too often acts as though his tenure were a mere precarious annual possession. The simple reason is that, in the one case custom, acting with the force of local law, and resting

upon the happy traditions that unite the landed classes of the North, does really restrain the law of the land, and almost always vindicates the rights of the tenant; whereas, in the other, such a guarantee is wanting, and the tenant is left comparatively defenceless, unless he chooses to have recourse to agrarianism as his only safeguard. In the one case an *imperium in imperio* is created with all but controlling power; in the other there is no such salutary check, any check there is is feeble or bad; and the result is that the general law is much less impeded in working injustice." This implies that the general law does injustice, as it manifestly does.

Nor is this all. The custom, itself, is open to great doubts, and the *Times'* Commissioner observed:—

"It is obvious, too, that Tenant Right in its existing state contains the germs of serious and even perilous dissension, though the custom usually prevents their appearance. A landlord, influenced by the law and his interests, is apt to consider the Right as a parasite from which his estate ought to be set free; a tenant, looking from an opposite point of view, thinks of the Right as of a most sacred property—in all respects a part ownership in the soil. Their notions accordingly may conflict, and law being on the side of the landlord, he is tempted to carry out his ideas, and to assail or weaken the tenant's position, though, as I have said, as a general rule, the custom prevents injustice or discord. Occasionally, however, some wrong-headed person will violate the usage even directly; and I have been informed of instances within Antrim and Down, in which Tenant Right has been practically annulled, by a raising of rent inconsistent with it, or by eviction without compensation. When such cases occur, the serious mischief of leaving the Right in its actual condition becomes strikingly and painfully apparent. The tenant's property is inevitably confiscated, for his Right—which, in the opinion of the country, is a valuable interest, and, in numberless instances, has been made the subject of lawful disposition—is destroyed by a perversion of law; and all the improvements he may have added to the land, which the Right alone, as a



rule, protects, are lost in the general disaster. Such a proceeding in truth is almost worse than anything which can occur in the South, inasmuch as the rights of the Northern tenant exceed usually those of his Southern fellow, and if, fortunately, agrarian crime has not followed in recent times, this is because such doings are so rare, and general opinion so condemns them, that their evil influence has not been developed. Moreover, two or three cases of this kind, nay, even the rumours of such cases, have the effect of creating great discontent; and had I not witnessed such things in the South, I should have been surprised at the evidences I have met of dissatisfaction among Northern farmers, who actually had little or nothing to complain of, yet felt themselves injured because the Tenant Right of some distant equal may have been invaded. Not a few of these men have declared to me that they felt insecure, that their Tenant Right was an inadequate protection, that they too had a real grievance, and differing, as the great majority do, from the corresponding class in the South, they sympathise with them on the Land Question."

It is not to be wondered at, therefore, that the current has run strongly towards fixity of tenure, and it is observable that the *Northern Whig* went on to suggest something of the sort, and hinted that fines for such perpetual leases would only be fair, while on the other hand such perpetuity of tenure gets rid of all difficulties as to compensation. On the whole, therefore, it appears naturally enough, in the course of discussion, to have swallowed up all other plans. Mr. Butt, who at first went in for sixty years' leases, now is for perpetuity of tenure, which, however, is capable of any degree of fair modification.

The *Times*, in publishing Mr. Buxton's letters on the question, introduced them by some observations, pointing out how the new law developed into security if not fixity of tenure:—

"We publish a letter from Mr. Charles Buxton on the Tenure of Land in Ireland, which may be accepted as an indication of the stage to which speculation has advanced. Mr. Buxton claims to be

heard as the holder of Irish land under an indefeasible Parliamentary title granted by the Encumbered Estates Court ; but this position, which might excuse, if not justify, the strongest assertion of the rights of ownership, has not prevented him from studying the matter with the impartiality of an outsider. He goes so far as to declare, at the outset of his letter, that he no longer holds it necessary to prove that "security" as distinct from "fixity" of tenure must be granted to the Irish tenant. We entirely agree in this judgment. There will, of course, be persons insisting to the end that it is unnecessary and inexpedient to alter the existing relations of landlord and tenant in Ireland, but for practical purposes it may be assumed that the Irish tenant will shortly receive some sort of security in his holding."

The only question, as Mr. Buxton said, was what plan should be adopted. He rejected Mr. Caird's, and also the Ulster custom ; and the *Times* observed :—

"We agree with Mr. Buxton in rejecting Mr. Caird's suggestions. Mr. Caird proposes to fence around the landlord's powers with such conditions that he would practically be stripped of all control, reasonable or capricious, over his tenant, while the tenant would still be so far theoretically subject to his landlord that he would retain the sense of insecurity. It is true, indeed, that Irishmen have already rejected Mr. Caird's proposals from both sides, and we fear we must treat them, as a whole, as an impossible solution of the question. We dissent, as we have said, from the grounds of Mr. Buxton's condemnation of the proposed extension of the Ulster custom. He thinks he proves to demonstration that this extension would be a flagrant confiscation of the landlord's property."

The *Times* argued against this view, and upheld the Ulster custom, but its own correspondent had pointed out that it was impossible to define what it was, that it varied in different counties, and that it could be got rid of by arbitrary eviction, and that it was greatly on the decline. To this may be added that it is after all no adequate protection. He says :—

"A tenant who has paid 20*l.* an acre for a farm, legally a mere

tenancy-at-will, has bound himself in a heavy recognizance to obey the injunctions of a landlord, who can, if he pleases, destroy his property ; he is pledged more or less to submission from the consciousness of what authority may inflict. And though the custom is strong enough to secure the tenant in the great mass of cases, and though it has made him a free man compared to his fellow in the South, it does not save him from this sense of subjection ; and Tenant Right, unrecognised by law, has been found to be a powerful instrument to uphold the landlord's influence. This has repeatedly been shown in elections and other political contests."

And after all, even assuming the custom valid, and legally binding, as it may be and usually is—a custom between incoming and outgoing tenant, not as against the landlord, as it only affects him indirectly, not at all preventing him in point of law from evicting his tenant at the right termination of his tenancy, or raising his rent—it is a very indirect and uncertain substitute for legal security of tenure. Thus the *Times'* Commissioner observed :—

"It is, however, when we come to consider tenant-right and these analogous equities with reference to our legal system that the resemblance between them becomes most striking, and most distinctly challenges attention. In different degrees these common claims of the Irish tenant tend to engraft an interest in a landlord's estate derogatory from absolute ownership ; in the case of the tenant-right of Ulster, an interest of a very decided kind ; in the case of the looser equities of the South, an interest less clear or less recognised, but, notwithstanding, usually respected. This interest, however, although it conflicts directly with a landlord's legal rights, is not, either in the North or the South, protected by the State ; and as a Southern proprietor may ignore any equity of his tenant in respect of improvements or of money laid out in the purchase of good-will, so a Northern proprietor, as a matter of law, may extinguish the tenant-right on his estates, either by unduly raising his rent, by a notice to quit, or by eviction, assuming of course, as generally happens, that legally his tenant holds only at will."

What would be the value of such a custom as the basis

of legislation? Moreover, some tribunal with compulsory power would be necessary. This was shown by a correspondence between Lord Portarlington and Dr. Taylor. The noble lord wrote :—

“Now that the excitement of tenant-right meetings in this part of the country has somewhat subsided, I feel that as a landlord I have some claim to learn from yourself, as having been chairman of one of the principal of these meetings, and also as one who is known to hold wise and moderate views on the question of landlord and tenant, what we landlords are to understand to be the real meaning of the words ‘fixity of tenure,’ used so constantly both at the meeting presided over by yourself, and also at the other meetings held on this subject in other parts of the country.

“If you remember, the words always used up to this year as embodying the fair demands of the tenant-farmers of Ireland were ‘security of tenure.’ Now they are changed to ‘fixity of tenure.’

“Does the latter term simply mean the former? If so, I as a landlord can most heartily join in them, and will willingly give my humble support in the House of Lords to any measure brought forward by Mr. Gladstone’s Government by which this may be secured to the tenants.

“But if ‘fixity of tenure’ really means (as in England it is understood to mean) the handing over the property of the landlord to the tenant, subject to a mere rentcharge to the owner of the soil, then I say such a scheme deserves the reprobation and strenuous opposition of every honest man in the kingdom. I feel certain no Government would ever propose such a measure, or any Parliament be found to pass it. I feel certain, moreover, that no such idea ever entered your own mind while presiding at that meeting in Maryborough. If so, I quite join with you in believing that we shall see this vexed question satisfactorily set at rest for ever, and that with restored tranquillity and contentment the prosperity and resources of this country will become greatly increased and developed.”

To this Dr. Taylor replied in effect that he would be well

content with security of tenure if it could be got. But how (he asked) was it to be secured? He could not see, he said, how, unless it was by some tribunal of arbitration with compulsory powers. This seemed to be admitted on all hands, and so the *Times* wrote:—

“The necessary consequence of intervention on the part of the State between landlords and tenants in Ireland must be the creation of a power—it may be the ordinary Law Courts, it must more probably be a local and accessible tribunal—authorised to arbitrate between the contending parties. They cannot, when left alone, settle their differences peacefully and equitably. That is the foundation of the whole matter; and it follows that a third moderating authority must settle them for them. It does not follow that this third power, thus created and held in reserve, will often be called upon to act. We hope and believe that it would operate while actually inactive. If we had not this assurance, the prospect would be darker than it is; for it is scarcely conceivable how any community, above all a community so strictly agricultural as the Irish people, could subsist if the relations of the cultivators of the soil and its owners were constantly referred to the judgment of arbitrators. We must, indeed, face the possibility while believing that it will never befall us. Our conviction is that the sense of there being over both a power strong enough to compel recalcitrants to acquiesce in just judgments will induce the most perverse to listen to reason beforehand. It must be remembered that even now the actual cases of flagrant wrong are comparatively few and rare. The unwritten law of tenure abiding in the minds of the peasantry is understood and respected by the mass of the landlords, and the peasantry in their turn acquiesce in the fair claims of landlords. If this be the case, not only now, when any infraction of the understanding between the two parties is punished by an organization of revenge, but habitually, when the landlord is apparently unrestrained by any sanction, how much more sure—we may say how certain—it is that the creation of a legal provision for determining and enforcing the equities of tenancy will lead landlords and tenants to respect these equities without calling upon the superior power to enforce them! It will be enough that the authority is at hand and ready to be set in

motion to insure in almost every instance the effects it is created to secure, and that without any formal exercise of its power."

The plan advocated by the *Times* was a tribunal of arbitration, to entertain appeals from tenants against the arbitrary exercise of the power of eviction. This Mr. Buxton, we think rightly, deemed inadequate. The *Times* advocated it ably thus:—

"But now compare with the other schemes which Mr. Buxton discusses the proposal to erect Local Courts of Arbitration. We do not wish to prejudge a question Mr. Buxton half promises to examine, but we ask him to consider a few points connected with it. In the first place, it leaves the landlord in possession of his beneficent, while depriving him of his wrongful, power. The tenant, under notice to quit, or to submit to an increased rent, or to abstain from dealing with the land in any particular fashion, appeals to the Court, and the case has to be argued there. If it shall appear that he is farming properly, that he pays rent regularly, that the rent, according to certain prescribed principles, is a fair rent, in a word, that there is no reasonable objection to him as a tenant, he will be protected in his tenure or awarded a compensation for retiring. If, on the other hand, it appears that he is in arrears, or that he is exhausting the land so that there is no security for the rent of next year, or that he is sub-dividing, or that he is proceeding upon a plan of so-called improvement, which neither, from his own nor from the landlord's point of view, will justify the title, the landlord's right will not be suspended. In a word, the tenant would get not merely security but fixity of tenure, subject to the condition of fairly farming. The landlord would retain all reasonable control, and be secured in the receipt of his rental. Mr. Buxton objects that the plan would involve expense; but, in fact, it would work as a weapon always at hand, but rarely used. The Court would have to decide between grasping landlords and thriftless tenants. The mass of Irishmen would be left as they are, save that they would be covered with a shield of security from "felonious" conduct. The great merit of the proposal to erect Courts of Appeal may be briefly stated. At bottom it rests upon this, that there does exist what may be loosely described as a *law* of Irish tenure now, which is respected as a *law*

by the great majority of Irishmen. But this which we call a law is not such, for it wants the sanction of the Legislative authority. The proposal is simply to confer upon it that sanction. At present the sanction it has is the blunderbuss. It is admitted as a principle by landlords as well as tenants that the tenant has a moral claim to remain in possession as long as he does his duty by the land and pays his rent to the landlord, and, again, that the landlord has a claim to a periodical revision of the rental. Upon examination of the economic history of the country, the principle is found to be equitable and expedient, and suited to the conditions of its society, as might be inferred from the fact of its universal recognition. Is it not, then, the act of a statesman to give to it the sanction of the State instead of that of organized assassination ? ”

On the other hand, Mr. Buxton argued against it with equal ability, thus :—

“ In addition to these three leading proposals is that one of which the outline was shadowed forth in your columns, viz. :—That tribunals shall be established with authority to receive complaints from tenants threatened with eviction, and, where they see fit, to ‘ protect the tenant-in-possession for a definite term,’ or, in some cases, to award him ‘ a lump sum as compensation for unjustifiable eviction.’ The advantages of such an arrangement seemed manifestly to be very great. On the other hand, it would be attended with heavy expense, and some doubt may be felt whether it would fulfil the essential condition of satisfying the Irish people. Who is to pay the expense of so protracted and difficult an inquiry ? But, say that the arbitrator’s arbitrators—those to whom he has delegated his decision—report to him that the tenant does farm badly and ought to be removed. Then comes the question, shall compensation be given him for his occupation-right ? If so, how much shall it be ? But I might go on all day with the perplexities that may—that almost certainly must arise. I will, however, add but one query more. I want to know whether the State is to support the wife and children of the arbitrator, after he has met his too probable fate, from those tenants to whose eviction he has consented ? . . . Again, is there solid ground for hoping that the Tribunals of Arbitration would be accepted in Ireland as a substitute for direct legal security

of tenure? I noticed that when Lord Portarlington threw out that very suggestion, the *Freeman's Journal* (than which no paper in Ireland stands higher) and other newspapers at once replied, 'Yes, but what about security of tenure?' We must not suppose that because this plan would harass the landlords it will, therefore, be embraced affectionately by the tenants. Look at the position in which it would leave them. They have risen almost as one man to demand, with intense earnestness, that they shall have security in their holdings. The Liberal party has virtually pledged itself to give it them. Yet, after all, they will find that security in their holdings, even for a time, is to be denied them; that tenants-at-will shall be tenants-at-will still, but that, henceforth, the tenant who receives notice to quit shall be allowed to appeal to a tribunal of a perfectly novel kind, one, therefore, of whose fairness he has had no experience, composed, perhaps, of unknown strangers; guided by canons of which he has no conception; and he will have to prove to the tribunal that his landlord is not justified in attempting to remove him. And how is he to prove this? The landlord, of course, will resist his plea, and will do so, no doubt, through his man of business, probably a solicitor, with a train of witnesses at his elbow, to show perhaps that the tenant had neglected his farm, or that his removal was necessary to some plan for the improvement of the property. It is unavoidable that the tenant, in resisting all this, must incur expense, to him, perhaps, almost ruinous."

Mr. Buxton, having thus argued against the plan of arbitration merely by way of appeal against eviction, propounds his own plan, as more simple and effectual:—

"If these considerations be fully weighed, I think it will be felt that, while any plan which leaves it to the option of the landlords to give security of tenure or not would fall too short of the tenants' demand, and would not effect any lasting settlement of the question, or bestow tranquillity on Ireland; on the other side, the Ulster scheme would be intolerably hard to the landlords, and pernicious to future tenants; in fact, that it would be a gift, at the expense of those two classes, to the existing occupiers. . . . But now, for a moment, contrast with this tangled thicket of perplexities the perfect simplicity of the rival scheme, under which there would be



no arbitrations, no valuations, with their uncertainties and their enormous unavoidable expense; but every tenant would be a leaseholder under covenants of the simplest kind, laid down by Act of Parliament; every landowner would know the exact limits of his power. The primary question, whether security of tenure is to be given or not, is altogether a separate one. In this discussion I proceed on the assumption that we are willing to face these and other evils, and that for high reasons of public policy the Liberal party desires to give security (not fixity) of tenure, and that now the immediate question is, which of the proposed plans for bestowing it will prove to be the most just and the most effectual? Now, this being our postulate, the proposal for which I have attempted to plead would at least have this merit, that it would act upon it in a perfectly direct and straightforward manner."

His plan was, that there should be a presumption in favour of a long duration of tenancy, say forty or sixty years; the onus being on the landlord to displace it. This, he said, would really give security of tenure.

"One thing I rejoice to observe—namely, that the respective advocates of these two schemes are perfectly at one in their fundamental ideas. This is agreed on both sides, that 'the landowner in Ireland must henceforth be disabled from evicting a tenant at his mere whim and pleasure;' and, as you add, 'the real point now is, in what way and to what degree shall this security of tenure be enacted?' This, then, is our starting point. We are going to give security (not fixity) of tenure to the Irish tenants. Of course, we are going to give them not an illusory semblance of security, but real *bonâ fide* security. It is essential that in studying this subject we should lay hold of that fundamental idea with the strongest grasp."

The objections to Mr. Buxton's plan were stated with most ability by the Earl of Airlie, who argued it thus:—

"It is one of the radical vices of Mr. Buxton's proposal that the same rigid rule is to be applied, without the possibility of modification, to farms of all sizes and of all kinds, large or small, grazing or arable; to all tenants, thrifty and industrious or idle and im-

provident ; to all landlords, good, bad, and indifferent. One instance more. Nothing, it is well known, tends more to enhance the value of certain descriptions of land than plantations judiciously laid out, and this altogether apart from the value of the timber. The shelter they afford to stock is often a consideration of paramount importance. But under the proposed system of compulsory leases it will be impossible for a landowner to form plantations of this kind without, in many instances, obtaining the consent of a large number of occupiers, from each of whom it may be necessary for him to take a bit of land. Those who know with what tenacity an Irishman clings to every fraction of an acre in his occupation will be best able to judge what chance there will be of improvements of this kind being carried out if landlords are to be compelled to give leases to every occupier of three years' standing. I have brought forward some instances to show how these compulsory leases will operate in depriving landowners of the power of improving their estates. But, perhaps, that is a question not very much worth discussing, as the landlord will have but little inducement to make improvements of any kind. Few men will desire to sink money in an investment which will yield them no return for a period of thirty-one years. For my part, I cannot imagine any scheme better calculated to foster absenteeism. The landlord is to be divested of all power ; he is to be forcibly relieved of all responsibility ; he is to be reduced to a cipher. Why should he continue to reside on an estate in the management of which he cannot possibly take any interest ? It appears to me that the arguments, both political and economical, against Mr. Buxton's proposal are absolutely overwhelming."

It could not but be observed, however, that the Earl of Airli's objections could be applicable to any long leases, although most leases are granted in England and Ireland by the best of landlords and with the best results. Here let us notice a fallacy fallen into by an able journal, the *Pall Mall*, which, in one of its articles on the subject, said:—

"Fixity of tenure would ensure slovenly tillage. It may not do so, and apparently does not in Belgium, France, or Hindostan ; it almost invariably does so in Ireland."

Upon which Colonel Mure at once wrote to correct this erroneous impression by pointing out that fixity of tenure did not exist in Belgium; and then he fell into the similar fallacy of urging that tenancy-at-will was consistent with good cultivation. He wrote:—

“First, fixity of tenure, as between landlord and tenant, does not exist in any part of Belgium. In that country the land is, for the most part, let in leases of three, six, or nine years, the period being regulated, more or less, by the rotation of the crops, thus, to a certain extent, following the principle advocated by Mr. Caird. In one district of Flanders, the Pays de Waes, which is the extreme type of *la petite culture*, the soil is cultivated almost exclusively by tenants-at-will. Throughout the rest of Flanders, where the subdivision is most minute and high cultivation prevails, four-fifths of the land is tilled by tenant farmers. In Luxembourg and the Ardennes, where much of the land is unreclaimed, and the existing cultivation is of the most elementary and wasteful description, the proportion is almost exactly reversed. Throughout the kingdom about seven-tenths of the land in cultivation is in the hands of tenants. The above calculation excludes moorland and forests, the greater part of which belongs to the communes. In the case of leases the law lays down no statutory notice previous to eviction, except such as is provided by local usage. The tenant-at-will, in the Pays de Waes, is subject to eviction, without any intimation whatever, up to the last moment of the agricultural year. In the different provinces the reimbursement of the outgoing tenant for manure and seeds is regulated by usage, the observance of which is made compulsory by law. Ulster tenant right, i.e., the purchase of goodwill by the incoming tenant, is unknown. Secondly, far from tillage by proprietors ensuring good cultivation, the result is exactly the reverse. It will be found that in Belgium the quality of the husbandry is in exact ratio to the cultivation of the land by tenants and owners, the figure of merit being highest where the land is let to tenant farmers, as in the two Flanders, Brabant, Hainault, Antwerp, and Liège, lowest where it is cultivated by the proprietors, as in Luxembourg, Limbourg, and Namur. Is it not a remarkable fact that the Pays de Waes, where tenancy-at-will, and, as I am prepared to prove, its

attendant evils, largely prevail, is so highly cultivated that it has received the appellation of the 'Eden of Belgium'?"

But this mode of arguing is utterly fallacious, in confounding law with fact. In this country tenancy-at-will is usual in agricultural tenancies, but then the custom is to continue such tenancies unless there is some fair reason for terminating them. And then Mr. Dixon, in his "Law of the Farm," points out that in parts of England where there are no leases the same farm is occupied by tenants of the same family generation after generation, for century after century. But he also points out that in other parts of England there are leases, and that cultivation is best where there are either leases or customary tenant right. No one who has looked below the surface can suppose that actual insecurity of tenure is compatible with good cultivation. Custom often modifies law. And thus it is in this country, where, although in strict law the farmers are mere tenants-at-will, yet they are practically continued in those tenancies to the end of their lives. Thus it is with some parts of Ireland, as the *Times'* Commissioner says :—

"The classes connected with the soil in this county (Fermanagh), which have shaped its destiny, and given it its social form, have for centuries lived together in goodwill ; and, in the relation of landlord and tenant, have treated each other with mutual regard, have considered their respective rights and duties, and have even extended the gracious usages which have been the fruit of this state of things to those once in a thoroughly subject position, and still widely separated in race and religion. Society, accordingly, has grown up under kindlier and more happy auspices than in less fortunate districts ; and the great relation of owner and occupier of the soil having been placed on foundations comparatively sound, security and progress have been the consequence."

Where it is so there is the less practical necessity for any alteration of the law by legislation, though it is questionable whether it is a healthy state of things, that which leaves

the cultivation of the soil legally at the mercy of the landlord. At any rate there is, however, no great practical evil, though it has been observed by English judges that such a species of tenancy is contrary to the ancient policy of the law.\* But where it is otherwise, as it is in most parts of Ireland, the evil is one which calls loudly for remedy, and will no longer admit of delay. We rejoice that Parliament is to be called upon at once to remedy it. And as the discussion of the subject will necessarily open up great questions, and involve the whole relation of landlord and tenant, it is as well that there should be a history of the law on the subject, with a view to show what aid law may afford in legislation.

This we understand to be the scope and object of Mr. Finlason's work. He has faith, it appears, in the historical method of solving great problems of legislation, and appeals to history upon this. He insists that history shows that from the earliest dawn of regular law in this country perpetual and inheritable tenure was the rule; and that it became obsolete only on account of the extreme inconvenience of such tenure at fixed rents, when those rents became merely nominal. A rent of four shillings at the time of the Conquest was something substantial, and even as late as the reign of Edward IV. it was the price of a good horse, equal to 20*l.* or perhaps 40*l.* now. But in the time of the Tudors such rents began to be inconsiderable, and soon became utterly nominal, as we see by the old customary freeholds at rents of a shilling at this day. Such tenure, therefore, ceased, except in manors, where the provision for *fin*es made up for the decline in the value of rents, and tenants had to agree from time to time to fair rents, and to pay *fin*es for renewal of tenancies. Leases for lives, often renewable for ever, upon similar terms, succeeded to the old inheritable tenancy, and in course of time the customary yearly

\* 2 W. Blackstone's Rep. 1174.

tenancy, continued generation after generation, became, on account of its convenience, most general.

In this historical view of the subject, Mr. Finlason thinks he sees the key to the solution of the question, and his view certainly in substance agrees with that of the most temperate advocates of the tenant's interest in Ireland or England. He insists upon retrospective compensation as a means of enforcing perpetual tenancy, or, where the tenancy is to be granted to a new tenant, he hints at premiums or fines by way of consideration. He supports his view by reference to the Roman law as established in this country, and by the local customs, which he says embody it, and he appeals to Mr. Dixon's book in proof of those customs. On the whole, the work is likely to be of interest and use in the discussion of the question.

The most interesting aspect of the question, as we said at the outset, is its bearing upon the subject in England, and the deepest interest is taken in it. At an agricultural meeting at Wenlock, a farmer said :—

“The question was not one that affected the farmer simply, but the country at large, since no man in his senses would invest a large amount of his capital in the improvement of land so long as he had no security for its return: and the result was that many farms were but indifferently cultivated, and consequently much food was lost to the nation. His idea was that a legislative enactment giving the tenant compensation for unexhausted improvements was necessary, and he would move, ‘That it is necessary for the encouragement of a better cultivation of the soil that legislation should be obtained to give to the tenant compensation for unexhausted improvements.’ Colonel Corbett, M.P., testified to the ability with which Mr. Davies had brought the matter forward, but considered that leases would be more generally liked by both landlord and tenant than the plan proposed, and he did not see any difficulty in the way of granting leases. In his opinion the objection to leases was greater on the part of the tenant than on the side of the landlord. He (Colonel Corbett)

had repeatedly offered them, and could not get his tenants to take them. He thought that no tenant could work as well under a Tenant-right Bill as under a lease, as in the latter case he would know how many years he had to depend upon to recoup himself for his outlay. After a lengthy discussion, in the course of which the Chairman showed that some years ago it was the custom in Salop to grant compensation to a tenant for unexhausted improvements on his leaving a farm, which is now the practice in Lincolnshire and Kent, and advised that, instead of asking for legislation on the subject, the old custom by common consent be resorted to, the following resolution was carried:—‘That it is necessary for the encouragement of a better cultivation of the soil that legislation should be obtained to give to the tenant compensation for his unexhausted improvements in the case of buildings and drainage, the landlord’s permission having previously been obtained.’ A vote of thanks to the Chairman closed the proceedings.—*Birmingham Daily Post.*

There was another similar meeting, at which the Earl of Harrowby and the Earl of Lichfield were present. These things are significant of the deep interest taken in the subject in the country, both by landlord and tenant.

Some of the arguments, even of Liberal members, against permanence of tenure, are obviously fallacious—confounding tenancy with property. At Ipswich Mr. Adair thus alluded to the subject:—

“He said he had some connexion with Ireland, and he would tell them what he really believed to be the case in respect to Ireland generally. It had been said that all the improvements which had been made in that country had been made by the tenants, and never by the landlords, and that, therefore, the suffering tenant must have the protection of the law against the exactions and harsh treatment of his landlord. Now, that was not the case, however much it may have been, and even then only with some qualifications in years gone by. He alluded to the Encumbered Estates Court, and with reference to the evictions said such a process was by no means easy. It

seldom occurred, except for non-payment of rent, and he thought he was right in saying that in the last year there had been 1400 evictions, or one in every 457 tenancies, which had been for non-payment of rent. If a landlord wishes to evict a tenant he has to give notice to the relieving officer of the union that he must prepare to receive the evicted man and family into the poor-house; he must also give notice to the sheriff, and he is also bound to give notice to the tenant before he is evicted. What he might call fanciful evictions, apart from non-payment of rent, were quite the exception, and not the rule; but he did not mean to say that it was not the duty of the Government, as far as they possibly could, to protect the tenant from capricious evictions. He was sure the Government Bill would provide some means of affording protection against such evictions, at the same time that it would also respect the rights of the owners, and protect them in the enjoyment of their property. He regretted the course pursued by the agitators, who, he said, had rendered it exceedingly difficult to approach the question and arrange the details. They had been preaching up a fixity of tenure, by which, so long as a man pays his rent, which is to be variable, and regulated according to the price of provisions, so long shall that man have an indefeasible right to the land he cultivates, and shall, in fact, come in and supersede the proprietor in the right to maintain and enjoy that land. No one would consent to hold land on such an understanding, for the nominal owner would cease to be the proprietor, and would have merely a rent-charge upon the land."

Now, this was the entire error, for tenancy, even in fee, is quite consistent with the property being in the landlord. And here the history of the subject comes in, and is of use. Here we have an intelligent Member of Parliament apparently utterly unable to reconcile ownership in the landlord with permanent or perpetual tenancy in the occupant. Yet history shows that such was the universal system in this country for ages. The free agricultural tenancy was inheritable, and hence the term "freehold;" hence also "free-man" and "freeholder," now synonymous phrases. Tenancy-at-



will, or leases for years, was deemed only fitted for serfs. At this moment manorial tenancy is inheritable, only with the condition of fines on descent or alienation. Yet the lord is not less the owner. Nothing is more clear than that the freehold estate is in the lord in such case, though the interest is in the tenant. Such is the scope of Mr. Finlason's book. His idea is that of perpetual tenancy purchased by premiums or fines, *from which the compensation for past improvements is to be deducted.* Thus he seems to have come to the same conclusion as Mr. Caird, who, at pp. 27, 28, says:—

“If Ulster farmers have hitherto found it profitable to pay a fourth or a third of the fee simple value for the mere right of occupancy, how much more gladly will they enter into an arrangement which in thirty-five years would make them the owners of their farms, at an annual charge not much greater than they are paying for their present uncertain tenure. For example, a tenant-right farmer has a farm of forty acres, the market value of which is 30*l.* an acre, equal to 1200*l.* This will yield in rent at the ordinary rate of purchase in Ireland:—

“Four per cent. on 1200 <i>l.</i> ... ..	£48
--	-----

“Instead of this he will pay to the Government, or to those holding its Guaranteed Land Deben- tures, 5 per cent. for thirty-five years ... ..	60
--	----

“Which is an addition annually of ... ..	£12
--	-----

“But he will have a claim for his tenant-right, which, if equitably arranged between him and the owner, will more than clear off this annual balance, and leave him a positive gainer from the first by the change.”

There seems a general agreement in some principle of this kind. The only opponents of it deny the right to compensation, and claim the property with all improvements for the landlord, *without payment for them.* This, however, Mr.

Finlason says, is contrary to the old law of this country, which has been extended to Ireland, and he insists that it has only been by wrongful perversion of the law that the landlords in Ireland have evaded compensation, or thrown the burden on the incoming tenant. He cites copyhold tenure as an *ancient* precedent and the modern land settlement as a *recent* precedent. And he contends that legislation, to secure the tenant retrospective compensation for all past improvements, and to enable him to set off the value against fines or premiums for perpetual tenancy, will be only a restoration of ancient law and a restitution of ancient right.

---

#### ART. V.—THE CHARTERS OF THE CITY OF LONDON.

BY MR. SERJEANT PULLING.

THE charters of the City of London are generally identified with the history of the British Constitution; and yet there is hardly any subject of such consequent interest on which the world outside Guildhall have so very indistinct ideas.

We have all read of the hard-fought battles of old times between the Crown and the citizens of London respecting their ancient rights and privileges, and of the concessions which from time to time the Norman race of kings were forced to yield to the metropolitan City by way of recognition of those rights; and we all know that it was an express provision of the Great Charter that the City of London should have all its ancient rights and liberties. The more definite grants which the sturdy citizens wrung from the Crown during the York and Lancaster disorders, the good round sums by way of consideration for further concessions which found their way from the City coffers to the empty

royal exchequers, the very elaborate bargains which Guildhall had to make with the Tudors and the Stuarts, the worse than questionable character of some of these, and the effect of the judgment of forfeiture of the City charters, in bringing about the national Revolution of 1688, and the solemn Act of the first Parliament afterwards in restoring all the City rights and privileges, are recorded in every history of England.

That there must be something of more than ordinary importance in charters thus dealt with few would be inclined to doubt. Sceptics are effectually put to confusion when they see how much is made of them in high places at this day: how on such occasions as Lord Mayor's day or other municipal display when Guildhall reigns master of the situation, the judges of Westminster Hall vie with the law officers of the Corporation, and illustrious princes and statesmen vie with one another, in grandiloquence, whilst dilating on the time-honoured franchises conferred by the glorious charters of the great City of London: how intelligent foreigners are led to believe that the Lord Mayor of London is a personage far above the Lord Chancellor, and how the candidates for municipal favour tell the smaller world assembled at the wardmote and the various City halls, that they are prepared to do battle against all comers, to uphold and maintain inviolate institutions and franchises thus so bravely gained, and so highly prized. In the general reform of our municipal corporations, which was effected in 1835, the ancient Corporation of the City of London was deliberately left untouched; and it is not a little remarkable that with all the competition in our days between rival reformers of the two great parties in the State, the task of reforming the Corporation of London continues to be deemed too formidable for any statesman *in office* to undertake. Assailed, as it has been, for nearly half a century by reformers out of office, the civic Corporation is, for some cause or other, always treated with equal forbearance by

Liberal and Conservative when in actual power; condemned over and over again by solemn verdict, Guildhall seems always to have her sentence postponed, *sine die*. Newspaper writers and platform orators may pronounce her doom, but we have no authentic information as to when she will be brought up for judgment, and she stands meantime on her good behaviour. Though we may be all aware of these remarkable circumstances in the history and present position of the City of London, very few persons have any distinct notions as to what are the peculiar reasons which thus leave the City altogether exceptional in our system of local government; what really are the privileges and franchises at this day of the citizens and their very ancient Corporation, and what are the actual provisions of those ancient charters by which they are either conferred or confirmed.

From the learned work of Mr. Norton,\* published forty years ago, while he held office under the Corporation of London, now republished, as we are informed by the learned author, by the express direction of the authorities at Guildhall, we can gather a great deal of information on these points. Mr. Norton gives us not only an interesting account of the history and progress of the City, but the actual provisions of the various City charters, with a great variety of information thoroughly elucidating them. The book contains much that is useful to the lawyer as well as entertaining to the antiquary and the student of history.

In this volume we see how gradually our metropolis outgrew its municipal institutions. We look back to London of old—a compact walled town of 723 acres, manned by sturdy citizens, crowded together in wooden houses, and the victims alternately of fire and pestilence, but ready to act on the

\* *Commentaries on the History, Constitution, and Chartered Franchises of the City of London.* By George Norton, formerly one of the Common Pleaders of the City of London. Third edition, revised. Longmans & Co. London, 1869.

defensive against all aggressors—lawless kings, freebooting barons, and foreign adventurers; and we compare it with the London of our day, extending over an area of 115 square miles, with as many princely palaces as the old City had of permanent structures, with a population of 3,000,000, and thousands of miles of streets and buildings; in fact a province of habitations, by far the largest and most important in the world; whilst the bounds of the ancient *City* still remain the same, forming a sort of district of the actual town of London; described by Mr. Norton as “a vast mercantile emporium or factory, rather than a place of general habitation,” the resort during business hours of the mercantile world, but at other times the residence only of an altogether inferior class, the trader’s workmen and servants, the watchmen and the police, the publican, the huckster, and petty shopkeeper.

In the charters of the City of London, which Mr. Norton brings under our notice, we see the various kinds of privilege which the ancient civic body from time to time obtained, and we are able to judge of their actual value at this day, and to see how gradually but how completely things have changed; how on the one hand rights obtained at great cost, and maintained after endless contests with the Crown, have in the course of time come to be valueless; and how concessions, almost trivial in their origin, have expanded to an extent in no way contemplated at the time they were obtained, and how, though Guildhall at this day derives its authority only from the comparatively insignificant section of the inhabitants of London to which we have already referred, it enjoys by virtue of these old charters possessions and power, greater than any other municipal body, or indeed many sovereign States, possess.

¶ The whole number of charters granted to the City of London seems to exceed 120, but many of these are mere repetitions, or confirmations on *inspeximus*, of previous grants; and Mr. Norton gives us a most useful and reliable sum-

mary of the principal concessions. It is remarkable how very little is contained in any of them (except so far as they make out the title to the City revenue) of any practical value to the general body of citizens of London at this day.

The series commences with a charter from William the Conqueror, that the citizens of London shall be *lawworthy*, and protected from wrong. To use Mr. Norton's language,\* "it confers nothing new, nor does it confer any specific or distinguishing privileges, merely declaring that the Conqueror would not reduce the citizens to a state of slavish vassalage." The charters that immediately follow contain, for the most part, either general confirmations of the City franchises, or special concessions of personal exemptions to the citizens, of appreciable value at the time they were granted, but of no use at this day. There is not to be found among them any *governing charter* in the correct sense of the term, or any provisions making the local government of London *essentially* different from that of ordinary municipal towns—or in truth any concessions materially different from those made to the cities of York, Bristol, and Norwich, and twenty other corporation towns, dealt with by the general Act of 1835 for reforming our municipal corporations.

The early London charters, so far as local government is concerned, are, for the most part, confirmatory only of institutions previously in force. Thus the right of the citizens to elect their mayor is first mentioned in a charter of King John, but the office had really existed under another name, as portreeve, &c., for ages previously, and indeed it may be assumed that nearly all the municipal institutions of this ancient City had their origin in periods long antecedent to any royal charter.

Henry I. granted to the citizens of London to choose their own *Justiciar*, and a succession of charters from the time of Edward III. to George II. invested the mayor

\* Lib. 2, ch. 1, p. 258.

and aldermen of London with the powers and duties of Justices of the Peace. Mr. Norton refers to the incessant conflicts between the citizens of London and the Crown as to the limits which, by virtue of their various charters, were placed on the ordinary system of administering justice, and a great deal has occasionally been made of these concessions by zealous advocates for the City rights; but there was nothing in the charters to the City of London in principle differing from those granted to other municipal bodies, and practically they do not place the City magistrates on a materially different footing from that of ordinary borough magistrates. The system, indeed, of chartered justices has been generally abolished by the Municipal Reform Act. The aldermen-magistrates of the City of London however remain, and, with the exception of the anomalous provision which makes one London alderman in matters of summary jurisdiction equivalent to two ordinary justices, they have nearly the same judicial functions and perhaps usually administer justice as well as the majority of unpaid county and borough magistrates; that is, with the aid of well paid-professional men, expressly appointed to keep them clear of the many legal slips and blunders, from which in times past the great unpaid had so frequently to suffer, and a certain class of legal practitioners derived gain, in the shape of verdicts for nominal damages and heavy costs.

The charter of Henry III. conferred on the City of London the shrievalty of the county of Middlesex, and the duties, honours, and emoluments pertaining to that ancient office to this day devolve on the two citizens annually chosen in Common Hall to be *sheriffs* of the *city of London*; but the Guildhall accounts of our time show anything but a gain to the Corporation from this concession; and, in fact, from the evidence of persons who seem to have purchased experience in such matters, it seems clear that, neither the office of Sheriffs of London, or that of Sheriff

of Middlesex, is now productive of profit to any one except the various solicitors who, acting as under-sheriffs or their deputies, are said to derive a considerable balance after deducting the actual expenses from the official proceeds.\*

There are many other concessions in these charters, for the most part of little real interest for any but antiquarians.

A large number of the charters of the City of London contain provisions exempting the citizens of London and their goods from certain ancient tolls, such as bridg toll, childwite, jeresgive, and Scotale, the very names of which are hardly known at this day, all benefit from the immunity having been for many ages abandoned. Other charters in accordance with ancient custom confirm to the citizens certain privileges in law suits, which are practically of no use at this day. Such are the provisions in a charter of Henry II., in two from Richard I., and five from King John. Henry III. granted no less than nine charters to the citizens, four of them confirming afresh the various privileges thus already enumerated; but in no way affecting the constitution of the Corporation, or the civic government. Other charters conferred on the good citizens the privilege to hunt within the county of Middlesex, and elsewhere in the suburbs of London, a privilege to which the sporting citizens of the twelfth century probably attached great value, but which, in after ages, was productive only, to the good folk within the walls, of little else than ridicule, and the expense of keeping up an establishment, of which the only remaining relic is the office of *Mr. Commoner Hunt*, an official who, in a very remarkable garb, we believe, still shows himself at most of the Lord Mayor's feasts.

The rights derived by charter and otherwise which are at this day of substantial value to the Corporation of

\* See evidence of Mr. Wallis, Sheriff of London and Middlesex, before London Corporation Commission, 1853. Sec. 1355.



London, and, as far as the present system of municipal administration admits of it, of advantage to *the City* of London, consist of those which directly or indirectly contribute to the Corporation revenues, and on this subject much may be learnt by going back to the charters.

The ordinary revenue of the Corporation of London was officially reported to the Commissioners of Enquiry in 1853 to consist of no less than 222,840*l.* per annum, whilst the aggregate annual amount of the income of the various estates in which the authorities at Guildhall are directly or indirectly interested as trustees for express public or charitable purposes it would be impossible to fix at a less sum than 1,000,000*l.* sterling.

It may be interesting to trace the sources and growth of this vast revenue of the Corporation of London, and to see how far the City charters serve as their title deeds.

The rapid growth of the revenue of the civic Corporation is certainly remarkable. That the citizens of London were at all times a substantial body, capable of raising good round sums for the common good, there can be little doubt. The heavy contributions from the Guildhall coffers towards the exigencies of the State upon every occasion where an excuse for levying them could be made, prove that the resources of the Corporation were always great. The renewal of their charters from time to time, or the concession of fresh privileges, were generally made the occasion of such contributions, and when money could not be otherwise obtained, the reigning Prince not unfrequently honoured the City magnates by accepting sums by *way of loan*; and at a fitting opportunity, got the debt cancelled, making some new concession by way of consideration.

The Corporation by such means seem to have obtained some of their most valuable privileges. Thus Edward IV., in consideration of a past loan of 1923*l.* 9*s.* 8*d.* granted to the Corporation the right already referred to, of purchasing lands in mortmain, and a short time afterwards got a further

loan from Guildhall of 7000*l.*, and the royal borrower had to pay it off by conceding to the Corporation a number of offices or powers to intermeddle with the daily transactions of traders, which greatly augmented the City revenues at the traders' cost.

The offices which the Corporation of London, by virtue of various charters from the Crown, and by ancient custom confirmed by Statute, from time to time thus acquired, gradually came to confer on the City authorities a simple power of levying taxes on trade, of the same character as the ordinary customs duties. The authorities at Guildhall provided beams and scales, and weights and measures, and employed a small army of porters, meters, gaugers, &c., nominally to secure regularity in commercial dealings, but really to obtain a permanent revenue for the Corporation. The way in which the metage of coal and corn came first as an office derived from ancient custom, was converted into a sinecure by a charter of James I., and into a grievous tax by special Acts of Parliament, obtained by civic influence, has been so often commented on of late years that it is needless to refer further to the matter here.

The growth of the City estates in land, &c., is no less remarkable than revenue from other sources. Up to the fifteenth century it is generally supposed the Corporation possessed no actual property in land. A charter from Henry VI. granted them the common soils, purprestures and improvements, wastes, streets, ways, &c., within the City and suburbs, and in the waters of the Thames within the old limits of the City, and all the profits and rents to be derived therefrom, a grant which Mr. Norton disclaims as *a title to the actual property* in them.\* Other charters, before and after, granted to the civic authorities various unenclosed lands, &c., for public purposes; thus Smithfield, or Smooth field, was from a very early period civic property, for the

\* Lib. 2, ch. 6, p. 372.

purpose of holding a market as well as for a variety of sports; and Charles I., confirming the title of the City to all erections, and to the streets and waste grounds, granted further the tract of open ground then called *Moorfields*, and also expressly confirmed the City title to West Smithfield, with a proviso that these should not be built upon. For other public purposes, the City authorities at Guildhall obtained possession of valuable property, *e.g.* the land now forming the conduit mead estate, for the purpose of supplying London with water; but at this day it is no exaggeration to say that nearly the whole of the landed estate thus acquired is leased out by the Corporation to private persons, and that the direct revenue from these sources goes simply into the City coffers. The amount in the Guildhall accounts is put down at a sum exceeding 100,000*l.* per annum.

The various offices held by the Corporation in connection with the regulation and control of trade bring even a larger amount, though the cost to the City is small, and the value of the *services* which form the foundation of this large revenue is estimated by the commercial community at a very small figure, if, indeed, the interference of the civic officers can be treated as of any public advantage at all.

The charters of the City of London, therefore, in themselves serve at this day rather as muniments of title of the Corporation of London to a large corporate revenue, than as a code of regulations for the government of the City. So far, indeed, as they serve to keep up a system by which one small portion only of London has municipal institutions, to the exclusion of—if not at the cost of—the rest, they simply serve to keep up a great anomaly.

We have already referred to the anomaly which exists in the local government of London in its present state; the municipal institutions and large municipal revenue conferred by ancient custom, and such a number of charters on the

City of London, having come, by a concurrence of circumstances, to belong only to a part instead of the whole of the actual City.

This anomaly we cannot view as the legitimate result of the City charters. Indeed, looking to these charters as a whole we feel justified in saying that the rights and privileges, as well as the powers and duties, which they create or regulate, ought justly at this day to extend to the whole area of the metropolis. Taken altogether, the charters of London militate against the existing state of things. Many of the early charters, indeed, seem distinctly to point at an extension of the municipal area, and the subjection of the surrounding districts to the civic government, but the legal machinery adopted for this purpose seems to have been at all times sufficiently clumsy.

Up to nearly the end of the sixteenth century the whole of the metropolis was confined within the actual City walls. From an ancient map of London, dated 1560, we are able to vouch for this as an indisputable fact, the suburbs being almost devoid of buildings, with the exception of a few straggling houses leading up the Strand, and a few more round about Smithfield, and the open fields coming close up to the City wall, throughout almost the whole northern and eastern circumference.\*

As the space within the City walls came gradually to be regarded as too confined for purposes of residence, as the old habitations of wood came in the beginning of the seventeenth century to give way to buildings of brick, and habitations were sought for in the outskirts, the most clumsy contrivances were resorted to by way of municipal regulations for these new districts. The old City walls were left as the municipal boundaries, whatever course private enterprise might take in spreading the actual area of London. The City of Westminster, the town of Southwark, and a

\* See Mr. Norton's Book, p. 140.

hundred villages and hamlets, were gradually absorbed in the metropolitan province. The colossal London of our day was suffered to arise with no other foundation for its local government than that provided by the general law of the land, by the several authorities of the county, the hundred, the parish, and the leet.

The question of an improved system of regulations for the streets and sewers, &c., of any particular district was left to the mercy of mere local adventurers, availing themselves of the lax practice of Parliament in dealing with schemes for private Bills.

The evils of our unhappy system of private Bill legislation have been nowhere more felt than in the metropolis. It being always competent to small bands of adventurers in a district to obtain a local Act of Parliament under the pretence of local improvements, and to form a local board, and levy local rates to carry it into effect, London, as its dimensions spread, came to be divided into the most irregular patches, and to have inflicted on it many hundred distinct local Statutes, and nearly as many local boards, for this patchwork sort of local government.

The Corporation of the old City of London, meantime, instead of helping to establish system in the local government, contributed rather to bring about a chaos of legislation on the subject, which, to a large extent, even now exists. The success of the Corporation in resisting legislative interference has gradually produced evils of a very serious character to the metropolis. The Corporation, who have an official expressly appointed to watch all Parliamentary proceedings in any way supposed to affect the City of London, have hitherto generally succeeded in getting exempted from all legislative improvements to which they were inimical, by obtaining a simple saving clause in their favour, or obstructing the proposed plan altogether. The effect of all this has been to substitute for a real system of local government for the metropolis the mass of patch-

work legislation to which we have just referred, sometimes confining to single portions of London provisions which ought to extend to the whole; sometimes, as in the case of the formation of the docks, &c., abandoning great public works to mere private bodies; whilst the same bad principle has been adhered to in the legislative measures, doubtless promoted at the instance of the civic authorities.

The number of local Acts thus called into existence affecting various portions of the metropolis alone amounted, it is believed, when the Metropolis Management Act of 1855 was passed, to about 500. That Act created a great improvement, but a still greater reform would have been effected if the Corporation of London had taken the initiative, and by a timely concession agreed to the same principle being adopted in dealing with London as was followed thirty-five years ago in dealing with all the other corporate cities and towns in the kingdom.

The course followed by the Legislature in the Municipal Corporation Reform Act, so far as relates to those towns included within its provisions, was to bring all that would popularly be termed *the town* within the scope of the same municipal authority. The Municipal Corporation Commissioners, in their Report on the City of London in 1837, stated that they did not "find any argument on which the course pursued with regard to other towns could be justified, which would not apply with the same force to London, unless the magnitude of the change in this case should be considered as converting that, which would otherwise be only a practical difficulty, into an objection of principle," and the Commissioners go on to say that they are unable to discover any circumstance justifying the present distinction from the rest of London, of the small proportion of the metropolis at present comprehended within the municipal boundary. In the interval that has elapsed since this recommendation was made, nothing effectual has really yet been done to secure proper municipal institu-

tions for the metropolis. The Commissioners, who in 1853 inquired afresh into the subject of the Corporation of London, did not adopt the recommendation already referred to; and though we have since had a metropolitan Board of Works established, for regulating and controlling one important branch of local government, yet in other respects legislation has stood still. The cost to the rate-payers of the metropolis is not by any means diminished, and London is as much without a system of municipal government as ever.

During the many years that the subject of a municipal government for the metropolis has been under consideration, we have had many suggestions from men earnest in the cause of a salutary reform.

It is urged, in conformity with the objections stated by the Commissioners in 1853, that London is too large to be placed under a single system of local government, because the two first conditions for municipal government—minute local knowledge, and community of interest in local works—would be wanting; but it is a remarkable circumstance that, as if by way of entire refutation of this notion, within a year after the Report came out the Metropolitan Board of Works was legally established, and the inconvenience thus alluded to has not arisen.

The schemes founded on this assumption, therefore, must be received with some doubt, and we cannot think that the plan suggested in some quarters, of parcelling out the metropolis into districts, to be governed by separate and independent municipalities, would be beneficial. We go further, and say that if there is to be one system instead of a variety of systems of local government for the metropolis, the safest and wisest course to adopt would be to take up with the old municipal government of the City of London Corporation, subject it to some wholesome ordeal of reform, and spread the area of the municipal authority, with the municipal franchises, over the whole of London.

We rejoice to see that a feeling is now growing up that after all the schemes that have been proposed the simplest course is the best, and that the venerable fabric of the Corporation of London is quite as capable of adaptation to the wants of our time as that of York or Bristol, that by applying with some necessary variations the provisions of the Municipal Corporation Reform Act of 1835, the City of London may be made to embrace the whole of the metropolis, and the ruling body of the Corporation of London be composed of representatives, chosen, not as now from the narrow section of residents within the district of the old civic area, but from the inhabitants of the actual City of this day.

It is with no feelings of hostility we assert that the municipal representatives of this City are now in a false position. These gentlemen have, many of them, ably and honourably filled the places they hold in the Guildhall councils. Under an altered system many of them would be unquestionably elected for a far larger and more honourable area of usefulness.

The old Corporation of London in many respects is an admirable institution, and its upright system of administration has elicited the praises of nearly all who officially, or otherwise, have had to look into it. By distributing the business of local administration among permanent committees, the civic body succeed, both financially and otherwise, in getting through their work as well, if not better, than any municipal body in the kingdom.

By simply extending the field of operations of the admirable system of administration at present in force at Guildhall, by means of standing committees, there is really no part of the duties of the municipal government of the metropolis which could not be managed, at least as effectually, economically, and satisfactorily, by the reformed Corporation of London as by the present Metropolitan Board of Works, or indeed any other that could be devised.



The various boards at present entrusted with the different duties of municipal administration in the metropolis are not kept in operation without considerable cost, as the ratepayers well know. Were these all merged in the Corporation of London, the heavy items of establishment expenses must inevitably be diminished, and another great advantage would be gained. The expense, even of Corporation state and ceremony, if incurred for the whole instead of a part only of the metropolis, would not be grudged; but even for this purpose it is not likely that the cost of a Corporation for all London would be greater than that now maintained at Guildhall.

On every ground, therefore, financial and administrative, the extension of the municipal area of the City of London to the whole metropolis would be a gain to the ratepayers and the inhabitants of London. We believe that the better part of those who now hold municipal offices would have small cause to complain, and if sentiment is to enter into the consideration, such a destination for the good old Corporation of London must be viewed with satisfaction. With all the sneers at old Gog and Magog, with all the schemes of modern innovators, it would be a great thing to uphold an institution so time-honoured, and in accordance with Magna Charta and so many subsequent State guarantees, to preserve to the *City of London* at this day all its ancient and legitimate rights, privileges, and franchises.

---

#### ART. VI.—THE NEW BANKRUPTCY ACT.

**T**HE Bankruptcy Act which came into operation at the beginning of the year is in all respects a most important measure, effecting as it does so many changes in the law, and purporting to give in but 136 sections the main outlines of a Bankruptcy Code. The new Statute appears

to give satisfaction in the commercial world, but it remains to be seen how long this will continue; we doubt whether its somewhat vague and often sweeping provisions will find equal favour among lawyers. Everyone has now grown so accustomed to revolutions in Bankruptcy Law that all astonishment has ceased, else some surprise might be felt at the fact that this branch of our legal system, though entirely created by Statute, has been since the days of Henry VIII., undergoing change after change, only to arrive at its present confused state. We have been for three centuries repealing, consolidating, and amending the various enactments that were for a brief time fashionable; but it is within the last forty years that we find the greatest activity in bankruptcy legislation. In 1831, Lord Brougham passed his Act, which established the Court in London, and introduced the seeds of our present system. He was hailed as a national benefactor, particularly by honest creditors and debtors; and his official assignees were considered to be a great improvement upon their predecessors, the trade assignees. Men compared the new Act with the old one, and found in it everything worthy of praise. Formerly, the creditor's assignee had kept all the money he could, and otherwise defrauded the estate; now, people said, we can rely on the honesty and proper working of the new official assignees. But the natural applause of novelty soon died away, and then came about the usual dissatisfaction. Creditors were particularly discontented with the limited power they possessed over the bankrupt's property, and so, amidst more applause, the Bankruptcy Consolidation Act of 1849 was passed. This great and comprehensive measure lessened the influence of the official assignee, and made many other important alterations. Then came the Act of 1861, putting the officials in a still lower place; while, by the last Statute, they are all abolished. Their popularity, which was so great in 1831, gradually declined until it seems to have entirely

departed; thus showing the influence of a kind of fashion upon our law-making in the place of that scientific consideration and arrangement which would have been more appropriate. One of the great aims in framing a Bankruptcy Act should be to deal justly with both creditors and debtors, and to balance equally their respective powers. The three later Statutes have not succeeded in doing this, but have alternately taken one side or the other. The Act of 1861 leaned so much towards favouring the unfortunate debtor, that creditors frequently lost even justice. Under the new Statute creditors are once more placed in a powerful position, and upon the use they make of this superiority will depend, to a very great extent, the success of the measure.

But there is another matter that, though it is of great importance, hardly receives equal attention. Proceedings in bankruptcy are all more or less judicial. They take their efficacy from this fact, and they should be carried on under the authority and supervision of the Court. Now, the extent to which this authority is to be exercised has always been a question of difficulty in bankruptcy legislation, and it has varied according to the opinions in vogue at the time of passing the different Statutes. In regarding this point we come back again to the assignees, for it is evident that the Court has always had greater power over an official than over a creditor's assignee. We have already observed the changes in this respect that have been made at different times, until, coming to the last Act, we find a trustee chosen and directed by the creditors, but also, to some extent, under the supervision of the Court. This trustee is very like a trade assignee with a new name, but he appears likely to assume a more official character. Should most trustees act honourably, and should the Court's power over those who do not be actively used, then one of the most difficult problems will have been solved, and the new Act become more likely to prove successful than

at present appears. But it should be remembered that the creditor's assignees who obtained so bad a character prior to 1831, had much in common with the new trustees; and that the checks given to the Court upon the conduct of the trade assignees under the Act of 1861, and but little used though often required, were in effect the same as those of the new Act upon the conduct of the trustee. It would be a far more grateful task to have nothing but praise for the Statute of last year, but the history of past Acts cannot fail to make us doubt whether this one will not imitate them, and prove a delusive failure. However, the Bankruptcy Act, 1869, will probably be the law for some years; and we will therefore proceed to inquire into its general effect and particular provisions, pointing out, meanwhile, the most important alterations it makes in the old law.

The first clause of much interest in the new Act is Section 6, defining the acts of bankruptcy, and giving other requisites of the petition. Adjudication upon a debtor's own petition is now abolished, being indeed no longer necessary, as it was only introduced, and afterwards extended to all classes by the Act of 1861, to give a means of getting released either from prison, or the probability of arrest under a *ca. sa.* The debtor, then, can only be made bankrupt upon his creditor's petition, though it may be presented by one or several, provided that his debt, or their debts together, amount to not less than 50*l.* Under the former Act a single petitioning creditor's debt must have been as much, but if two joined, the limit was 70*l.* together, if three 100*l.* The alteration now made is certainly an improvement, and although some have thought that one creditor for 20*l.* should be allowed to petition, it is difficult to see any theoretical or practical reason for such a reduction. The acts of bankruptcy given in this Section are necessarily very similar to those contained in the Acts of 1849 and 1861. Those affecting imprisonment

are no longer needed and are therefore omitted. By the first clause any conveyance or assignment to a trustee for the benefit of his creditors made by the debtor is an act of bankruptcy. Under the former Act such an assignment was protected if registered and fulfilling certain conditions which gave it efficacy. The two modes given by the new Statute as to liquidation by arrangement, and composition with creditors, render this protection no longer necessary; and as what were known as deeds of assignment and composition are now done away with—at least as to what we may call their judicial power—the making of any such deeds has become an act of bankruptcy. Clause 4 gives as an act of bankruptcy “that the debtor has filed in the prescribed manner in the Court a declaration admitting his inability to pay his debts.” This is but the old declaration of insolvency under a new name, and was, we believe, omitted from the original draft of the present Act. Without it there would have been some difficulty in managing a friendly bankruptcy, but with it nothing can be more easy, for upon the debtor’s filing such a declaration, a creditor can, within six months afterwards, upon a debt amounting to 50*l.*, present his petition against him. There are various other provisions of minor importance that will be found upon referring to the section itself.

Section 7 gives a debtor’s summons that is equally applicable to traders and non-traders, and may be noted as a great improvement upon the practice under the old law, where, by means of the more cumbrous machinery of two different forms, viz., a judgment debtor summons and a trader debtor summons, much the same result was obtained. Disobedience to this debtor’s summons is an act of bankruptcy.

The trustee is the most important part of the machinery now used for collecting, managing, and distributing a bankrupt’s property. He is in many respects similar to the old trade assignee: his greater power being checked by the committee of inspection appointed by the creditors, and the

comptroller, a new official of the Court. In imitation of that most admirable process, carried on under the direction of the Court of Chancery for the management of estates and the settlement of creditors' claims, he has much likeness to an official liquidator and receiver. Immediately upon his appointment all the bankrupt's property vests in him, he has full powers over it, subject indeed to the directions of the creditors, but practically very much will be left to his discretion. He is to declare a dividend and pay it: in short, he is the pivot upon which the whole scheme of bankruptcy administration will most certainly turn. The provisions by which all this is carried out show the spirit that lives throughout the new Act, the intent of the Legislature being to put the bankrupt and his property into the hands of his creditors, and, providing only the machinery for doing so, to leave them to realise the assets for themselves. In furtherance of this design, we find that, by section 14, after an order of adjudication has been made, the creditors shall by resolution "appoint some fit person, whether a creditor or not, to fill the office of trustee of the property of the bankrupt, at such remuneration as they may from time to time determine, if any." This resolution, as appears by section 16, will be decided by "a majority in value of the creditors present personally or by proxy at the meeting, and voting on such resolution."

The *status* of the trustee comes next, and this will be a matter of some importance in every-day practice, for his powers are so large and varied, and the system of checking him by means of a committee of inspection and a general meeting of creditors is so complicated, that we fear many questions of difficulty will arise. Sections 25 to 30 relate to the trustee's powers and duties, the nature and extent of which will be better understood by dividing the whole into three parts. (1.) What he can do of his own mere motion and in his discretion. (2.) What must be sanctioned by the committee of inspection. (3.) What must be approved

of by a majority of the creditors present at a general meeting or at the instance of a special resolution, which must be carried by a majority in number and three-fourths in value of such creditors. In regarding these three divisions, one cannot fail to be struck with an idea that the new Bankruptcy Act is only suited to those larger failures, where, from the magnitude of the interests involved, creditors are likely to take that trouble which appears necessary. The committee of inspection to be appointed by the creditors is to consist of not more than five of such creditors qualified to vote, and they are also to fix the *quorum* of such committee. Now, though all these and other similar regulations are doubtless well suited to the management of a large estate, where there is a body of influential creditors, yet they seem hardly compatible with those small bankruptcies of which we have lately had so many. It is probable that the framers of the Act were fully aware of this, and sought to give no encouragement to those petty failures, where no dividend at all is often paid, and which were so frequently brought on by fear of execution and arrest. We cannot here attempt to define the powers and duties of the trustee, but must refer our readers to the Act itself; merely observing that he will have to give some kind of security, and may receive some remuneration. This latter fact has induced a pretty general belief that a sort of new profession will in time spring up, comprised of men always ready to be trustees in bankruptcy. Such an event may perhaps happen, but it is at least clear that most of the large estates will fall into the hands of a few solicitors and the large accountants.

The trustee's title to the bankrupt's property, as already observed, is simply by virtue of his appointment, but, though founded upon that, it dates by relation back, from the commencement of the bankruptcy. By section 11 it is provided that the completion of the act of bankruptcy, upon which the order of adjudication was made, shall be

deemed to be the commencement of the bankruptcy. Now, as such an act must have been committed within six months prior to the presentation of the petition, the trustee's title cannot in general relate back to any date earlier than that period. But then the section goes on to provide that if the debtor is proved to have committed more acts than one, the bankruptcy shall be deemed to have commenced at the date on which the first of such acts was committed, within twelve months next preceding the order of adjudication. This will, however, only be the case when at the latter date the debtor was indebted to one or more creditors in the sum of 50*l.*, or upwards, which still remains unpaid at the adjudication: so that the trustee's title can never relate back more than one year, and then only where it is proved that during the whole time the debtor was insolvent, or appeared such, and so could have been made a bankrupt. The concluding portion of this section is new; the first part is similar to a provision in the Act of 1861.

We have now seen when the trustee's title accrues; the next question is what property is vested in him? Section 15, which refers to property divisible among creditors, relates to this, enumerating firstly what property is not so divisible, and secondly, what is. It is unnecessary here to dwell upon these provisions which are similar to the old law, or are of little practical importance; we will therefore take only clause 5, which contains the doctrine of reputed ownership, and is as follows; being one of the particulars that are comprised in the property divisible amongst creditors.

“(5.) All goods and chattels being at the *commencement of the bankruptcy* in the possession, order, or disposition of the bankrupt, *being a trader*, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner, provided that *things in action*, other than debts due to him in



the course of his trade or business, shall not be deemed goods and chattels within the meaning of this clause."

We have already noticed the commencement of the bankruptcy, and found that part of the same provisions were contained in the Act of 1861; this clause also is similar to another in the Act of 1849, but with two important alterations. Firstly, reputed ownership is now confined to traders. This is a return to the old law as it stood before bankruptcy was applied to all classes, and seems more in accordance with justice, for it is evident that more harm can be done, and fraud encouraged, by permitting trader debtors to show the public goods not their own without suffering any penalty, than in the case of non-traders, who do not rely so much upon appearances in obtaining credit: though, certainly, the distinction is rather fine. An attempt was made in the House of Commons to abolish the doctrine altogether, and it has been said that in such cases the creditors get other peoples' property, to which they have no just claim. But it must be remembered that those who let debtors have their goods so that they may, by a show of property, obtain credit, should take the consequence of their act, and that without some such provision more room would be given for the already common enough practice of swindling creditors. The second amendment made by the new Act in the doctrine of reputed ownership is that things in action, other than debts due to the bankrupt in the course of his trade, shall not be deemed within the clause. This was necessary, for, under the old law, things in action, such as promissory notes, cheques, bills of exchange, &c., were considered to be included in the term, "goods and chattels;" and so, though not belonging to the bankrupt, they passed to his assignees if found in his possession. Such a construction as this was evidently a most unjust and improper extension of the original principle, for things in action are an invisible kind of property,

upon which the bankrupt could not well have obtained credit.

While upon the subject of property it may be well to mention the changes made by the new Act in the law as to voluntary settlements made by a bankrupt. It will be remembered that under the Act of 1861, by section 126 of that Statute, it was provided that when a bankrupt, *being at the time insolvent*, transferred any of his property to his children or any other person, not being for value or in consideration of marriage, the Court had power to sell the same for the benefit of creditors. It was, therefore, necessary that any claimant should prove the insolvency of the settlor at the time of making the settlement before he could maintain its invalidity. The great and various difficulties that could not but arise in getting evidence to support such a case rendered the section of little avail, and the law was therefore seldom used. But by section 91 of the new Act this has all been changed, the relative positions are reversed, and the onus of proving his solvency is, in fact, thrown upon the bankrupt himself. This being one of the most important amendments introduced into the last Statute, it is worthy of a somewhat careful examination. The words of the section are as follow:—

“(91.) Any settlement of property made by a *trader* not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within *two years* after the date of such settlement, be void as against the trustee of the bankrupt appointed under this Act, and shall, if the settlor becomes bankrupt at any subsequent time within *ten years* after the date of such settlement, unless the parties claiming under such settlement can prove that the settlor

was at the time of making the settlement able to pay all his debts without the aid of the property comprised in such settlement, be void against such trustee. Any covenant or contract made by a trader, in consideration of marriage, for the future settlement upon or for his wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent in possession or remainder, and not being money or property of or in right of his wife, shall, upon his becoming bankrupt before such property or money has been actually transferred or paid pursuant to such contract or covenant, be void against his trustee appointed under this Act.

“‘Settlement’ shall for the purposes of this section include any conveyance or transfer of property.”

It will be seen that this section is framed upon the same principle as that which we remarked on in our last number, when considering the punishment of fraudulent debtors, viz., a distrust for one who does a suspicious act under suspicious circumstances, and a reversal of the ordinary rule of law by presuming him guilty until he proves his own innocence. For, as appears by the above, a post-nuptial settlement or other like transfer of his property by a debtor without valuable consideration, is void as against the trustee if he becomes bankrupt within two years after its date. This section then goes on to provide further that it shall also be void if his bankruptcy happen within ten years of such time, unless the parties claiming under the settlement can prove that the settlor was more than solvent when he made it, or, to use the words of the Act, was able to pay all his debts without the aid of the property so settled. These provisions seem stringent enough to prevent any kind of fraud in this direction, for, in the first case of such suspicious dealings, the settlement is declared absolutely void, while even in the second, and for so long a time as ten years, it is also void unless those claiming under it can show grounds for its validity. It will be seen that the whole section is carefully confined to

traders, though it would perhaps be difficult to give a reason for this distinction.

Another most important section of the new Act, and one which has done much towards giving it popularity, is the 48th, relating to the discharge of bankrupts. Under the old law the bankrupt had only to apply for his discharge and obtain it, unless his creditors opposed him. It is true the Court might suspend or refuse the order when he had been guilty of a misdemeanour, or had fraudulently contracted debts, or not kept proper books of account, or because of his extravagance, &c.; but there was no legal necessity for his having paid any dividend. Such a system as this naturally led to many cases of hardship and injustice to creditors, who, not being able to oppose on any of the above grounds, could do nothing to prevent their debtors obtaining a discharge from all future liability without even the smallest proportion of payment or composition. Again, creditors for many reasons—such as not wishing to waste time and money—did not go to the Court and oppose; consequently even the most fraudulent debtor escaped without trouble and without paying any dividend. This state of things had for some time furnished ground for complaint against the Act of 1861, and so, in the new Statute, we find it provided, that no bankrupt shall obtain an order of discharge, except under special circumstances, without paying a dividend of ten shillings in the pound, and that his after-acquired property shall in some cases remain liable for the payment of his debts. But to arrive at a clear understanding of this important section, it is necessary to consider two others, those providing for the close of bankruptcy and the *status* of an undischarged bankrupt.

By section 47 it is enacted that, when all the bankrupt's property has been realised, or so much thereof as can be realised without needlessly protracting the bankruptcy, the trustee shall make a report to the Court, and the Court, if satisfied that such is the case, or that a composition or

arrangement has been completed, may make an order closing such bankruptcy. A copy of this order is to be published in the *London Gazette*, and deemed conclusive evidence. This close of bankruptcy is an entirely new arrangement; it having become necessary as the order of discharge is likely to be delayed for some time in almost every case.

Section 54 defines the *status* of an undischarged bankrupt, and contains an entirely new principle and practice. When an order of discharge had been either withheld or refused under the old law, the bankrupt became at once liable to the ordinary process of an action at suit of any of his creditors. But where the order is suspended for the purpose of giving the bankrupt time to make up the required dividend before he can obtain his discharge, to allow such actions would be no longer equitable; so that, by the above section, no portion of a debt provable under his bankruptcy is to be enforced against the bankrupt until three years after the close of such bankruptcy. The bankrupt has thus three years given him in which to pay his creditors ten shillings in the pound, and for these three years he cannot be molested. If, however, at the expiration of that time he has not satisfied this requisition, any balance remaining unpaid, in respect of any debt proved in the bankruptcy, shall be declared to be a subsisting debt in the nature of a judgment debt, and may be enforced against the debtor, with the sanction of the Court which adjudicated him a bankrupt; but this will be subject to the rights of any persons who may have become creditors since the close of the bankruptcy.

We now come to the actual order of discharge, which, as appears from section 48, may be applied for by the bankrupt when the bankruptcy is closed, or at any time during its continuance. But, instead of its being for the creditors to oppose, the onus of proving the requirements of the Statute is thrown upon the debtor. The bankrupt,

then, must show to the satisfaction of the Court, either that "a dividend of not less than ten shillings in the pound has been paid out of his property or might have been paid, except through the negligence or fraud of the trustee, or that a special resolution of his creditors has been passed, to the effect that his bankruptcy, or the failure to pay ten shillings in the pound has, in their opinion, arisen from circumstances for which the bankrupt cannot justly be held responsible, and that they desire that an order of discharge may be granted to him." Upon showing that he has fulfilled any one of these conditions the bankrupt becomes entitled to his discharge; but the Court has still the power either to suspend or withhold it altogether in two cases. These are, where it appears, upon sufficient evidence, that the bankrupt has made default in giving up his property to his creditors, or where a prosecution has been commenced against him in pursuance of the provisions relating to fraudulent debtors contained in the "Debtors Act, 1869."

Section 49 gives the effect of an order of discharge similar to the old law, with the same exceptions, Crown debts being specifically added, for, though they have never been included, they are not mentioned in the like section of the former Statute. We thus see what a great change, and, as most people think, a great improvement, has been made in the law of bankruptcy by this portion of the new Act, placing, as it does, the discharge of a bankrupt upon a far more equitable footing, and giving fair consideration to the rights of creditors.

"Liquidation by arrangement" is a novel form of proceeding introduced by the new Act; the regulations concerning which will be found in section 125. It seems to be in many respects similar to a bankruptcy, and according to the sketch of it given in the above section, without publicity and interference by the Court. But by the rules that have been framed an advertisement is required, and the whole affair is made such a complicated mass of

judicial proceedings that we cannot attempt its explanation here. The meeting to be called, the proof of debts and voting, the debtor's conduct, and the trustee's appointment and duties, are the same as in a bankruptcy. Altogether, we think it probable that the new plan of liquidation by arrangement will be but little used, as it puts the debtor even more in his creditors' power than under a bankruptcy, and seems to possess but few special advantages for either party.

Composition deeds under the Act of 1861 gave rise to many commercial frauds and much general swindling, so that they have received a bad character. But these evil results arose rather from the blundering way in which the clauses of that Statute affecting these deeds were altered into an uncouth shape by odd Members of Parliament, than from any radical defect in the principles upon which their efficacy was founded. This became evident when the Amendment Act of 1868 was at last passed, and although it made at the best but a patchwork affair, we think many will soon regret that something like the same form of proceeding was not continued. The scattered sections of the two Acts that then regulated composition deeds might easily have been consolidated and improved into a more perfect and practicable whole. We should then have had the advantage of possessing in a compact and lawyer-like form a process of arrangement that was already well known in the profession and among commercial men. But the framers of the new Act thought otherwise, and in the Bill, as it left the House of Commons, we believe there was no section relating to a method of arrangement by means of a composition. At the instance of the Lords, the present section 126 was added, which affects to give, in very few words, a plan of composition with creditors, and has been rendered rather more complete by the rules that have been framed. The section itself reads more like a brief sketch of some proposed measure than an actual portion of the law; and as its provisions are likely to be extensively used, it is

probable that many questions of doubt and difficulty will soon arise needing solution. Readers will notice throughout that the draftsman has given it more a mercantile than a legal sound, but though ordinary and extraordinary resolutions may seem simpler than deeds, we doubt whether their construction and practical working will be found more easily decided.

By section 126, then, it appears that the debtor is to begin by summoning a general meeting of his creditors, without whom nothing can be done, and they may, by an extraordinary resolution, agree that a certain composition shall be accepted by them from the debtor. Now, an "extraordinary resolution" is rather a complicated affair, and consists of two parts. First, the creditors must pass a "special resolution," that is, one assented to by a majority in number and three-fourths in value; secondly, this resolution must be confirmed by another passed by a majority in number and value of the creditors present at a subsequent general meeting, held at an interval of not less than a week, or more than a fortnight, from the date of the former. There is one improvement introduced into the old method which deserves notice, and is contained in the third paragraph of this section, providing that creditors whose debts are below 10*l*. shall be reckoned in the majority in value but not in number; before this they had no voice in the matter. By clause 4 it is enacted, among other things, that the debtor shall produce to the meeting a statement, showing the whole of his assets and debts, and the names and addresses of his respective creditors. This statement will need to be both full and accurate, for the acceptance of a composition by the majority will only bind those creditors therein specified. To give these proceedings any judicial effect, the extraordinary resolution, together with the above statement, have to be registered by the Registrar. It does not appear how such a resolution is to be pleaded by the debtor in case an action be brought against him



at suit of a creditor bound thereby. The certificate of a deed, under the old law, was made available as a protection in bankruptcy. This is no longer necessary, as arrest upon a *ca. sa.* is abolished, but as a discharge in bankruptcy may by section 49 be pleaded in answer to such an action, one might have expected to find some similar provision with respect to these registered resolutions, which are, theoretically at least, to have the same effect. But by section 127, it is simply enacted that such registration, either in the case of a liquidation or a composition, "shall, in the absence of fraud, be conclusive *evidence* that such resolutions respectively were duly passed, and all the requisitions of this Act in respect of such resolutions complied with." It is difficult to see how this can answer as well as if the debtor had been allowed to plead the same to any action against him. It is impossible in this brief sketch to enter more fully into even such an interesting question as the practicability of these new forms of arranging with creditors, and we must therefore pass on to other portions of the Act.

The alterations effected by the new Statute in the constitution and powers of the Bankruptcy Court are of great importance, but for their better comprehension a few words of history will be found useful. Without going back to a period anterior to 1832, when some seventy commissioners roved about the country doing their work in a manner as unjust and barbarous as it was expensive, we find that at this date, and by Lord Brougham's Act, the Bankruptcy Court was first established as a settled tribunal in London. Under the Act of 1849 there was a court in London having a jurisdiction of about 100 miles round, the rest of England being divided amongst seven Country District Courts. By the Act of 1861 the London Court was charged with all cases occurring within twenty miles, where the debts amounted to less than 300*l.*, those previously disposed of by the Insolvent Court then abolished; while beyond twenty

---

miles all such cases went to their respective County Courts. By section 59 of the new Act this is altered, and it is provided that if the debtor resides or carries on business within what is called the "London Bankruptcy District" and defined by section 60 to include the City and the districts of the ten metropolitan County Courts mentioned in schedule 2, he is to be adjudged bankrupt by the Court in London, if not he must go to the County Court of his district, called the "Local Bankruptcy Court," subject to certain provisions for removing the proceedings to London. The limit as to amount of debts is done away with, and by section 130 the Country District Courts are all abolished.

Under the Acts of 1849 and 1861 the Court consisted of Commissioners both in London and the country, with registrars, official assignees, and messengers, and the County Court judges in other places, the registrars and high bailiffs of which acted as official assignees and messengers. But by section 61 of the new Act the London Court is composed of a chief judge and not more than four registrars. Official assignees are abolished, but as the registrars are to act as trustees until the creditors have chosen their own, they may perhaps be called official trustees. With regard to the powers of the new Court section 72 enacts that it may try issues of law and fact to do complete justice between all parties, being subject to no other court and having power to summon a jury.

Appeals were, under the Act of 1861, allowed from the County Courts acting in bankruptcy, and from the various Commissioners, to the Lords Justices. By section 71 of the new Act an appeal is given from local Bankruptcy Courts to the Chief Judge, and from his decisions to the Lords Justices. This is evidently a better plan than the old one, and will probably give satisfaction.

We have now gone briefly through the Act, touching lightly upon its most important sections, in the endeavour to give the reader some idea of the alterations that have

been effected. The rules that have but just appeared are long and elaborate, giving, in fact, a more finished and practical version of the Act itself, and needing, if possible, a more careful study. The subject is one too large to be exhausted in a single article, and, in many portions, of too technical a nature for discussion here. It must, moreover, be remembered that we have but written briefly upon a new and untried Act, and one which, besides containing many novelties in detail, has even introduced new principles into bankruptcy law.

F. M. WETHERFIELD.

---

---

#### ART. VII.—SLANDER.

CONSIDERING the very great importance of the rights of reputation, it is somewhat surprising that there is scarcely any branch of the law which is less generally understood than slander. Though the majority of persons have, at some period in their lives, been the victims of false and injurious reports, yet actions for slander are few and far between. The fact that the decisions are frequently obscure and conflicting, while the procedure for reparation is cumbrous and expensive, may account for the infrequent appearance of this class of cases in our law courts. Our daily experience of unhappiness in families in the higher, loss of trade in the middle, and violence and crime in the lower classes, originating from false and malicious statements, forbids our attributing this reticence from legal process to any other causes. It may, therefore, be interesting to consider somewhat briefly the present state of the law, and the defects therein, that from these considerations we may educe some suggestions for the further protection of the public against—

“The tongue that licks the dust,  
But when it safely dares, is prompt to sting.”

Slander is an injury for which, by law, an action for damages will lie. Criminal proceedings cannot be taken for mere spoken words, unless they are seditious, blasphemous, grossly immoral, or addressed to a magistrate while in the execution of the duties of his office, or with reference to those duties, or uttered as a challenge to fight a duel, or with an intention to provoke another to send a challenge. To be actionable, the accusation must be wilful, to the damage of another in law or fact, and be made without lawful justification or excuse. Express malice may be implied from the slander itself, and need not be proved. The allegation must be *false*; it must impute an indictable offence, a contagious or infectious disease, or be injurious to the profession or business of the plaintiff, or tend to his dishersion. In the first case, not only a punishable offence must be alleged, but it must be such a crime or misdemeanour as incurs corporal punishment. The charging an offence, therefore, merely punishable by a pecuniary penalty, although, in default of payment, imprisonment should be prescribed, would not be actionable, the imprisonment not being the primary and immediate punishment.

But the more frequent ground of action is that of *special damage*, as where, by the wrongful act of the defendant, a servant was prevented from procuring a situation, a tradesman lost his custom, or a woman her marriage. It should, however, be borne in mind, that the damage must be the mere natural and direct consequence of the unlawful act.

To the mind of a layman not versed in the nice distinctions of the law, the definition of what is, or what is not, slander is most perplexing. For example, it is not actionable to say, "J. S. is a murderous villain," as this simply implies an inclination; but to say, "J. S. is a murdering villain," would be actionable because it imports a crime committed. To charge another with a crime of which he cannot be guilty, as having killed a person still living, is not actionable, no matter how much the accused may have suffered in reputation therefrom. It is also a matter of difficulty to ascertain what is an

infamous punishment. No one, we think, will be prepared to say that a greater injury can be inflicted by slander than when an imputation is made on a woman of loss of chastity, yet, as the law stands, no damages can be recovered from the traducer, unless specific damage can be proved, which, in many instances, is simply impossible. Chief Justice Cockburn has said, "I think the law very cruel in preventing a woman who has been thus wantonly slandered from bringing an action for the purpose of vindicating her character." Lord Brougham considered the law not only "unsatisfactory" but "barbarous," while many other judges have regretted the state of the law in this respect, and expressed their dissatisfaction that they were not at liberty to determine differently. Illness may ensue from the excitement produced by the slander; a wife may become ill and incapable of managing her domestic affairs; her husband may be put to expense in curing her, and yet it is held, that mere mental suffering or sickness, supposed to be caused by words not actionable in themselves, would not be special damage to support an action. Let, however, the words be written, and the libeller would be liable to either imprisonment or damages.

We would here invite attention to the punishment of the slanderer. In the time of Alfred, the *publicum mendacium* was punished by the cutting out of the tongue, subject to redemption, *juxta capitis æstimationem*. The Greeks inflicted a penalty on the offender, and the Romans added to the fine the mulcting of the defendant in damages. Until very recently, the Ecclesiastical Court had jurisdiction in cases of defamation, and we find in the *London Chronicle* of 1790, that a lady was publicly excommunicated in that year—

"For defaming the character of another lady acquaintance. She was put in the Spiritual Court some time since, but refused to make any concession, although repeatedly applied to by the friends of the other lady. The consequence of excommunication is she cannot enjoy any legacy, inherit an estate, or receive benefit by law except in criminal cases."

By the 18 & 19 Vict. c. 41, the jurisdiction of the Ecclesiastical Court in cases of slander has been abolished, and the only remedy now left is by action of damages.

It has been said by a learned writer:—

“It would be highly inexpedient and mischievous to subject the utterer of every expression which might possibly provoke offence and retaliation, and ultimate violence, to a penal prosecution; it would be attended with fearful evils, legal as well as moral, if men’s mouths were to be closed to all communications in which the character or reputation of others might possibly be involved. What, then, is to be done if the evil cannot wholly be excluded, and cannot be tolerated without some restraints?”

We think that the same necessity of proving legal malice as now would exist should slander be made punishable in a Criminal Court, and it would certainly have as strict proof. We respectfully differ from the great authority we have quoted in thinking that men’s mouths would then be closed in any fair or just communications respecting the character of others; and we think that the present law places the poorer classes, to whom not unfrequently their character is their one chance of livelihood, in an unequal position before the law. A working man who has been foully slandered, and who has sustained special damage, must bring his action, and must give security for costs. This with many is an impossibility; and so the slanderer may reiterate his falsehoods, and ruin his victim without the latter having any means of redress. What wonder, then, that the experience of Criminal Courts will show a long array of crimes of violence, arising from unchecked slander. Libel is in law worse than slander, because (it is said) of the more durable publicity, and the deliberation of the slanderer in reducing the statements to writing; and therefore it has been made penal, while slander is comparatively free. We do not urge that the same punishment should be awarded to the slanderer as the libeller,

but we can see no reason why the utterer of a false and malicious falsehood, tending to the damage of another, should not be compellable before magistrates to enter into recognizances for his good behaviour for the future, and that words which if written would be libels, should for the purposes of binding over be considered slanders if spoken.

In the consideration of this subject, we have derived considerable advantage from the perusal of the recent edition of "*Starkie's Law of Slander and Libel*," edited by Mr. Folkard.

---

#### ART. VIII.—THE LAW OF LIMITATION.

*The Law of Limitation as to Real Property, including that of the Crown and the Duke of Cornwall, with Appendix of Statutes.* By WILLIAM BROWN, Esq., of Gray's Inn, Barrister-at-Law. London: H. Sweet, 3, Chancery Lane. 1869.

EVERY lawyer knows that one of the most important and frequently-recurring points to demand his attention, relates to the effect of time and circumstances in modifying titles and claims. No one knows so well as he how difficult it is, after a lapse of even a short time, to trace out and prove accurately or clearly the events of the past. Deeds and documents may be lost, altered, or destroyed, witnesses be dead or unable to be found, dates confused, and particulars forgotten. Hence our judges, especially in Equity, have long been inclined to discourage stale demands, and to refuse to sanction them by interfering with the actual position of things. Such active interference can only be justified when the state of things renders it probable that the Court has adequate means of arriving at the whole truth in the matter.

“One of the principal reasons for admitting limitations of suits is the difficulty of ascertaining the facts necessary to make it safe to exercise the judicial power.” Every custom, indeed, derives its force from time. Some persons, now-a-days, nevertheless, cannot acquiesce in the settlement of property made however long ago, though they insist on the validity of customs but of yesterday, and would exclaim loudly if they were the victims of a state of things imagined by Lord Macaulay—“Suppose you had no Statute of Limitations, so that any man among us might be liable to be sued on a bill of exchange accepted by his ancestor in 1760.”

It is, moreover, contrary to equity and policy that titles should be disturbed, or claims made, at any length of time; for, even if the proof of them could be indisputable and beyond doubt, it would be impossible either to ascertain or carry out the equities arising from the circumstances. All the contracts, relationships, settlements, and other acts done or created by or under those who thought they were entitled to possession, or free from demands, would have to be hunted up, and brought into Court, and all improvements would have to be considered, whilst rents received and spent in good faith must be refunded, and debts must be paid when the debtor or his representatives might by time or misfortune be in straitened circumstances. In fact, as a practical result, everything would be in uncertainty, titles would be unmarketable, and property unimproved, if stale demands were allowed. “The neglect of these salutary laws of limitation would make every title throughout the kingdom shake, and conjure up a frightful group, a host of dark and fantastic suitors, to blacken its courts, and fill their air with novel and discordant sounds, uncouth to all learned ears, unintelligible to all learned minds, and involve the community and all its real property in a maze of groundless, endless, pitiless litigation.” It is far better, therefore, even if it is not



absolutely necessary, that the community should hold that, after a certain time, by-gones should be by-gones, and should thereby divert the attention of its members from endeavours to redress the past,—thus raking up and perpetuating the memory of mutual wrongs—to manly efforts to make a future, and extinguish all hatreds and bitter feelings in the friendship of a common prosperity.

Mr. Brown's work on the Law of Limitation as to Real Property contains, in its introductory chapters, numerous extracts (besides those above given), showing that "in every civilised community a law of this nature, in a greater or less degree, has been established," and clearly setting forth the necessity and object of such a law. Certainly, if the chapters on the origin and object of prescription in general do not contain all that has ever been written on these subjects, they contain an ample repertory of copious extracts thereon, from the most eminent authorities, and the decisions and dicta of the most learned judges.

But though the law of England has recognised the principles of prescription or limitation, it is only within comparatively recent times that the Legislature has done so: for the first so-called Statutes of Limitation, as our author points out in his chapters on the rise and progress of prescription, fixed the periods of limitation by reference to certain fixed events—as the time of Henry L.—beyond the time of Richard I., &c., and they were not based on the principles of prescription. Indeed, it may be doubtful whether the legislators had any other views in the matter than to quiet their own possessions and bar the claims of those who had been "disinherited" in the wars.

Later Statutes, however, have established in most cases rules of limitation, perpetually acting and quieting titles on the true basis of prescription, so that "while the tendency of time is to destroy evidence of title, a title becomes firmer as it grows older." These Statutes have

been the subject of much discussion, and it becomes, therefore, of the greatest importance, especially to the lawyer, to have a good work making the whole law of limitation—which is even mischievous if it is not certain and well-known, and which meets him at every turn—clear and intelligible; and this we think Mr. Brown has done.

A satisfactory work on this subject must necessarily include a vast amount of learning. A glance at the notes to Mr. Shelford's edition of the Statutes of Limitation will at once shew this—as much by the merely incidental references which they contain to numerous branches of the law as by the more copious and direct information which they give. From Mr. Brown's plan, embracing not only these Statutes, but the whole law of limitation, he has been enabled to collect together in the shape of a treatise, principally on the law of limitation independently of the Statutes, most of the requisite preliminary matter to prepare the reader for the study of those Statutes, and to confine himself in the subsequent part of his work to matter more directly and specially applicable to the sections of the Acts.

We thus have, in Book II., chapters on the nature and effects of possession, as regards things corporeal and incorporeal, and as between the Crown, or the Duke of Cornwall, and the subject, and as between subject and subject. And these are followed by Book III., containing chapters on the nature of prescription at Common Law, as distinguished from custom, the persons who may claim, and the claims which may be made, by prescription and custom respectively, the proof of prescription at Common Law, and the loss of prescriptive rights at Common Law. This part of the work brings together a considerable amount of learning otherwise scattered. Most persons are aware of the proverbial efficacy of possession, but few lawyers even have very clear notions as to what constitutes it in many cases, and of the different sorts of possession, and the

various rights and effects incident to or flowing therefrom, and they will be grateful to the author for his labours on the subject.

In Book IV. the author treats of the territorial operation of the laws of limitation, the persons and things affected, the periods of limitation, and their shortening, suspension, and extension, and the operation of the Statutes on the expiration of such periods, and of acknowledgments of title and right. This portion of the work appears to be very satisfactory, and indeed we have found it on the occasions of diverse references for practical purposes to answer the prime object of such a work, and, moreover, to enable the lawyer to avoid the necessity of referring to other books for the proper subsidiary information.

The author does not travel much out of the beat of decided cases, but the many authorities quoted in his chapter on the interpretation of Statutes of Limitation will supply the best guide in doubtful cases.

The last chapter is upon the Statutes of Limitation as between vendors and purchasers—the usefulness of which speaks for itself. The Statutes are given in an appendix.

From the above references to the contents of the book, it will be seen that it faithfully carries out the promise of its title-page, and may be recommended to the practitioner as a comprehensive (and, we think, trustworthy) treatise on the effect of time, possession, and other circumstances, in supporting, modifying, or extinguishing claims of every sort concerning real property. The author appears to trust to his own language little, and to give, as far as possible, the words of authorities.

We could have wished, however, that in his endeavour to compress the dicta of different authorities into single connected sentences, Mr. Brown had paid sometimes a little more attention to construction. Our remark applies more especially to the earlier part of the book, where it is occasionally impossible to find a nominative for the verb and sometimes very

hard to find a meaning for the sentence. The latter, and most useful, portions of the work do not seem open to these strictures. The index is also disappointing, and does not do justice to the book. So full and complete a treatise should have had a more elaborate guide. Some important portions of the text are not referred to in the index (as far as we could see) at all.

---

#### ART. IX.—TRADES' UNION LEGISLATION.

BY HENRY F. A. DAVIS.

THE subject of trades' unions has for some time past occupied a large share of public attention, and deservedly so. In a country like our own, where the national prosperity depends upon the continued excellence and cheapness of the national manufactures, everything which tends to strengthen or weaken the friendly relations between capital, as represented by the employers, on the one hand, and labour, as represented by the *employés*, on the other, must be of national importance. To lawyers the discussion of the subject is especially interesting, because not only do these associations exercise a vast influence over the commerce of the kingdom, but they also give rise to many legal questions, which are by no means easy of solution, and require legislation which would effect great changes in the law as it at present stands.

In the year 1867 a Royal Commission was issued, to inquire into the operation and effect of Trades' Unions, and last summer the final report of the Commissioners was presented to Parliament. In it they recommended that trades' unions should be registered, provided that the rules of a society intending to be registered did not promote any of the following objects:—

- (1.) To prevent the employment or to limit the number of apprentices in any trade:
- (2.) To prevent the introduction or to limit the use of machinery in any trade or manufacture:
- (3.) To prevent any workman from taking a sub-contract, or working by the piece, or working in common with men not members of the union:
- (4.) To authorize interference, in the way of support from the funds of the union, by the council or governing body of the union, with the workmen of any other union when out on strike, or when otherwise engaged in any dispute with their employer, in any case in which such other union is an unconnected union.

From this report three of the Commissioners dissented, and two of them appended to their dissent an elaborate statement of their reasons for so doing. Mr. Hughes, one of the dissentients, has since, in conjunction with Mr. Mundella, introduced a Bill into Parliament, which has for its object to give to trades' unions certain powers and privileges that they do not now possess. To this Bill we wish to direct the attention of our readers, and, in doing so, it will perhaps be convenient to consider, (1.) The alterations in the present law proposed to be effected by the Bill; and, (2.) Whether sufficient grounds exist for any or either of such proposed alterations.

(1.) The proposed alterations in the law. By the first section of the Bill\* the 6 Geo. IV., c. 129, and the 22 Vict. c. 34, are to be repealed from the passing of the Act. By s. 2.,

“It shall be lawful for any number of persons engaged in any work or employment whatsoever, whether workmen or employers, to make any agreement with respect to the wages to be paid or the hours to be worked therein, *and with respect to the persons by*

\* This Bill will be found printed at length in 47 L. T. 30.

*whom or the mode in which any work is to be or is not to be done, and with respect to any terms or conditions whatsoever under which any work or employment shall or shall not be done or carried on."*

By s. 3, no person joining in a combination for any of the above objects shall be subject to a criminal prosecution merely because he has so joined.

With regard to that part of the second section which is printed in ordinary type, it may be remarked that no material change would be introduced thereby. The Combination Acts expressly provide that meetings may be held by either employers or employed, for the purpose of determining the wages to be paid or received by the persons present at such meetings, and the hours of labour necessary to earn the wages. The Bill proposes to render it lawful for the same parties to enter into general agreements on the same subjects, without the necessity of holding meetings; and as the amount of wages to be paid, and the number of hours of labour, are merely matters of contract, there can be no serious objection to the alteration.

That portion of the clause which we have printed in italics requires a more attentive examination. The law of England has always been remarkable for the promptitude with which it has discouraged everything which tended to restrict the operations of trade, or to infringe the freedom of individual action. Accordingly, we find that, even in the earliest times, any contract in restraint of trade was held to be null and void, and, as it should seem, rendered the contractor punishable at common law. Thus, in a case in the Year Books,\* a man brought debt on a bond, whereby the defendant bound himself not to exercise his trade of a dyer in the town where the plaintiff lived, for half a year, and it was held that the bond was void, and against common law; whilst *Hull, J.*,

\* 2 Hen. V. fol. 5, pl. 26, A.D. 1414.

swore that if the plaintiff had been present, he should have gone to prison until he had paid a fine to the king (*Per Dieu, si le pl' fuit icy, il irra al prison, tanq' il ust fait fine au Roy*). And although the doctrine has been somewhat modified in the course of successive ages, the general principle still remains the same, that any contract which operates in total restraint of trade is void at law,\* whilst any combination which has for its object the obstruction of the free course of trade may be punished criminally, unless it falls within either of the cases specially excepted by the Combination Acts.

Now, what is proposed to be done? To render legal combinations for the purpose of determining the persons by whom any work is to be, or is not to be done—the mode in which any work is to be, or is not to be done—and any terms or conditions whatsoever under which any work or employment shall or shall not be done or carried on. What these combinations are, and would be, appears from the Report of the Royal Commissioners. From this we learn that the unions seek to obtain a monopoly of labour, so as to raise the amount of wages paid to the monopolists.† To effect this, they have rules limiting the number of apprentices, and excluding, so far as practicable, workmen not belonging to the union; forbidding the employment of boys and women; prohibiting the members from working overtime, or taking piece-work; and strictly confining each class of workmen to its own division of labour.‡ So, in some cases, they claim the monopoly of the work of certain districts. A society in Manchester claim an extent of four miles in every direction round that town, or, in other words, an area of 120 square miles, as their own particular district, within the limits of which they permit no bricks to be

\* See *Mitchell v. Reynolds*, 1 P. Wms. 181; *S.C.* 1 Smith, L.C., 6th ed. 356. And see also the more recent case of *Mallan v. May*, 11 M. & W. 653; 13 M. & W. 511; where the question was very fully discussed.

† Report, clause 34.

‡ Clauses 34-39.

made, except by Manchester union men, or any bricks to be used except those made within the district.\* All these regulations are, as the law now stands, clearly illegal, inasmuch as they are in restraint of trade. Sir William Erle, in his "Memorandum on the Law of Trades Unions," appended to the Report of the Commissioners, gives several instances of similar restrictions having been held to be void; amongst these may be mentioned *Davenant v. Hardis*, Moore, 576, where it was decided that a bye-law of the Merchant Taylors' Company, restricting the dressing of cloths to the freemen of the company, was void for monopoly; and the *City of London's Case*, 8 Co. 121b, where a charter from the king, granting that none but those free of the city should trade therein, was held to be void for the same reason.

The decided cases, applying these principles directly to Trades' Unions, are few. In *Hilton v. Eckersley*, 26 L. T. Rep., 314; 6 E. & B. 471, some mill-owners in Wigan had entered into a bond, the condition of which, after reciting that the obligors employed many workpeople and servants, and that there were societies or combinations existing, whereby persons otherwise willing to be employed in the mills were deterred by a reasonable fear of social persecution from hiring themselves to work there, and whereby the legal control and management by the obligors of their property and establishments were injuriously interfered with; that the said combinations were sustained by funds arbitrarily levied and extorted by way of a rate upon the persons employed by the obligors, and receiving wages from them; and that it had become necessary, in the opinion of the obligors to take measures for vindicating their legal rights to the control and management of their own property, which would also best

\* Clause 37.



sustain the rights of the labourer to the free disposal of his industry; and that the obligors had therefore agreed to carry on their works in regard to the amount of wages to be paid, and the times or periods of the engagement of workpeople, and the hours for the suspending of work, and the general discipline and management of their works, in conformity to law, for twelve calendar months, in conformity with the resolution of a majority of the obligors present at a meeting to be held for the purpose of carrying the said agreement into effect: witnessed, that the condition was that if the obligors should for twelve calendar months carry on, or wholly or partially suspend the carrying on of their works in regard to the several matters aforesaid, in conformity with the resolutions in that behalf of a majority of the obligors, &c., the bond was to be void in regard only to the persons so performing the condition, but otherwise to remain in force. The Court of Exchequer Chamber held, affirming the decision of the Court of Queen's Bench, that the bond was illegal as being in restraint of trade (notwithstanding the 6 Geo. IV., c. 129), and as preventing the obligors from severally carrying on their own business, each according to his own discretion.

In *Hornby v. Close* (36 L. J. M. C. 43; S. C. 8 B. & S. 175; 10 Cox, C. C. 393; Law Rep. 2 Q. B. 153; 15 W. R. 326), it was held that a trades' union could not take advantage of the 44th section of the Friendly Societies' Act,\* which provides that any friendly society established "for any purpose which is not illegal" may deposit its rules with the registrar, and obtain certain privileges with respect to its property. In giving judgment, *Cockburn, C. J.*, said:—

"As trades' unions, so far at least, as they have come under my notice, have rules and regulations that operate in restraint of trade, I think that, just as in *Hilton v. Eckersley*, the combination of

\* 18 & 19 Vict. c. 63

masters to employ only such workmen as have complied with certain conditions was held by the Exchequer Chamber (affirming the decision of this court, to be not criminally illegal, but illegal in this sense, that the breach of an agreement relating to such a combination, could not be enforced in a court of law; so here, where we have a society which appears to be constituted for the purpose of carrying out the objects of a trades' union, I think it is illegal within the meaning of the decision in that case . . . . These rules, being in restraint of trade, are illegal, and cannot be enforced."

In the famous case of *Farrer v. Close*, 38 L. J. Q. B. 132; Law Rep. 4 Q. B. 602; 20 L. T. Rep. N. S. 802; 17 W. R. 1129, it appeared that the Amalgamated Society of Carpenters and Joiners was a society established under certain rules and regulations, among which were the following:—

"Rule 18, section 6.—Any officer being discharged from employment for holding office, if he sign the vacant book each day, he shall be paid at the rate of the wages he was receiving when discharged; such remuneration to continue until he receive employment. Section 7—Any free or non-free member or members leaving his or their employment under circumstances satisfactory to the branch or executive council, shall be entitled to the sum of 15s. per week. Section 9—Any member refusing work from private objections, unless he can show sufficient reason to a committee of a majority of the members at the next branch meeting, shall be suspended from donation until after he has been employed. Rule 25, section 2—In the event of an application to the executive council from other trades for assistance, the general secretary shall obtain information respecting the same, and, on the executive council being satisfied as to the genuineness of the case, shall grant such assistance as the state of the funds may warrant, or the case may, in their opinion deserve."

Two of the judges of the Court of Queen's Bench held that evidence was admissible as to the real character of the society; that the evidence adduced, taken with the rules,

which were ambiguous, showed that it was a trades' union ; and that, therefore, it came within the decision in *Hornby v. Close*, and was not legal : whilst two judges were of opinion that the rules did not disclose any illegal purpose, and that evidence of what had been done occasionally could not be used to show that the society was established for illegal purposes. The court being equally divided, the decision of the justices, which was against the society, was upheld. It has been remarked on this case that the judgment of *Cockburn*, C. J., with which *Mellor*, J., concurred, relies on the fact that strikes were in fact supported by the society, and seems to assume, though it is not so stated directly, that all strikes are illegal. This view of the law is stated to be based upon the principle of *Hornby v. Close* and *Hilton v. Eckersley*. *Hannen*, J., thought that the decision of the justices was wrong, because strikes are not necessarily illegal, and, therefore, supporting men on strike is not necessarily illegal. *Hayes*, J., was also of opinion that the justices were wrong, but he based his judgment chiefly on the vagueness of the evidence. He seemed to think that if the evidence had been clear as to the giving of money to men on strike to prevent their returning to work, he would have agreed with *Cockburn*, C. J., and *Mellor*, J.\*

Whether or not a strike is, *per se*, unlawful, in the sense of being criminally punishable, is a question of some difficulty which it is unnecessary to discuss at length. Perhaps the decision in *Walsby v. Anley*, 30 L. J. M. C. 121, tends to show that it is, but on the other hand we have the authority of *Bramwell*, B., in *R. v. Druitt*, 16 L. T. Rep. N. S. 858, for saying "that men have a perfect right to strike," and (*R. v. Bailey*, *ib.* 859) that "both masters and men have a right to combine—the one to say they will not employ labour in a particular way or on certain

\* 14 Sol. Jour., 94.

terms; the other, that they will not work under a certain rate of wages."

It will be seen from these decisions that the effect of 6 Geo. IV., c. 129, s. 4, is not to render combinations for raising or lowering wages lawful, but simply to relieve those entering into such combinations from *criminal* responsibility; and that therefore associations in the nature of trades' unions may exist, which, though illegal in the sense of not being civilly recognized, are lawful as not being amenable to the criminal law. Such associations can only have for their objects the determining of the rates of wages, and the number of hours of labour, and must not resort to any unlawful means for attaining those objects. We learn from the report of the Commissioners :— \*

"That no trades' union, so far as our observation has extended, has attempted to give to the combination a wholly legal character by confining the application of its funds in support of men on strike to the limits within which alone combinations are legalized by the Act 6 Geo. IV., c. 129. Unions contemplate generally the application of their funds to the support of men engaged in a strike for the purpose of enforcing some decision come to by the union in what they deem to be the interests of trade. Many such strikes would therefore be unlawful combinations at common law, and would not be relieved by the statute."

Such combinations Mr. Hughes' Bill proposes to legalize, as has been already pointed out, and passing by the remainder of the Bill, which relates chiefly to matters of detail requiring consideration when the important principles involved in the clause above quoted shall have been accepted, we now come to the second branch of our subject, viz., the question whether any sufficient grounds exist for the proposed changes in the law?

(2.) Trades' unions, in their primitive form, were merely

\* Clause 58.

benefit societies consisting of artisans engaged in particular trades, who combined together for the mutual assistance of persons employed in a similar manner to themselves. Thus one society would be established having for its members journeymen carpenters only; another would have bricklayers; a third printers; and so on. The object would be to relieve the members in times of distress or illness; to pay expenses incidental to death; to make provisions for widows and orphans of members; in short, to carry on the business of an ordinary friendly society, with the trifling difference that all the members must be employed in the same trade. Societies like these were familiar to the Anglo-Saxons, amongst whom they were known as "guilds," and in some respects were not unlike the large London companies in their present form.

In the natural course of events, these clubs gradually began to take an interest in those questions which principally attract the attention of their successors in the present day. How this came about may easily be seen. As the societies increased in number and importance, it could not well be otherwise than that members should apply for relief, who, upon being questioned as to their reasons for requiring assistance, should make answer that they could not obtain employment, or that they had been discharged, or that they did not receive sufficiently high wages for their labour, and that therefore they had refused to work. The other members of the society being all engaged in the same trade, would listen to such reasons as these, with an attention increased by a sense of community of interest; and would feel that any unreasonable acts on the part of the employers, which drove their fellow-workmen to the funds of the societies, were injurious to the body of operatives generally. What wonder is there, then, that they should meet together, for the purpose of consulting as to the best remedy for the evils occasioned by the unwarrantable demands of the

masters? or that they should endeavour to accomplish, by united action, that which unassisted individual efforts could never effect, viz., the securing to the labourer a fair day's pay in return for a fair day's work? For it must be remembered that the modern trades' unions would, in all probability, never have existed, but for the oppression of the employers, who, by reducing wages arbitrarily to suit their own interests, forced the workers to combine for their mutual protection.

The chief objects of trades' unions, as at present constituted, appear to be the fixation of the value of labour, and the equalising of the condition and wages of the labourer.\* In theory, they have but one weapon, and that is the negative one of refusing to work when what they consider to be the just demands of the labourer are withstood: in other words, of "striking work." In practice, they sometimes resort to other and less harmless means for attaining their ends, such as "rattening, picketing," &c. But these can hardly be called a part of the regular machinery of a trades' union, being more the results of circumstances than of any fixed plan; strikes, however, are the recognized means of trades' unions for attaining their ends. Now, morally speaking, it is difficult to see that there is anything wrong in a body of men simultaneously refusing to work except upon terms laid down by themselves. The terms upon which an individual works depend entirely upon the contract between himself and his employer, and that contract is purely voluntary. If the master does not offer wages, which, in the opinion of the man, are an adequate remuneration for his labour, he need not accept them; whilst, on the other hand, if the man asks too much for his services, the master may refuse to engage him. Both parties being thus at perfect liberty to insist upon their own terms, in the case of in-

\* Report, clause 28.

dividuals, there should seem to be no moral reason to prevent either masters or men from consulting with their fellows as to the terms of employment, and, having fixed upon those terms, from agreeing amongst themselves to obtain them, either by means of a lock-out on the one hand, or a strike on the other. So there can be nothing morally wrong in the workmen framing rules for their guidance in making their demands or in accepting employment; or in their paying periodical sums into a common fund by way of insuring themselves against absolute want in the event of a strike or lock-out actually occurring. Funds being thus obtained, there can be no reason why the contributors should not make regulations for the due application thereof; or in their providing that a member not complying with the rules as to employment, &c., shall lose his interest in the funds of the association. A rule to this last effect is only just, and occasions no greater hardship than does a regulation of a Mutual Insurance Society, which declares that a policy of life assurance shall be forfeited if the assured goes abroad, or otherwise neglects to observe the rules of the society.

Such a combination as that of which we have sketched the outlines, is, in fact, a trades' union of the present time in its simplest form, and one to which no objection can, in our opinion, be raised on *moral* grounds.

But while we think that unionism is not inconsistent with morality, we would not be understood to imply that it ought to be encouraged. On the contrary, we are strongly opposed to trades' unions, because we believe that they must have a prejudicial effect upon the commerce of the country, by increasing the cost of production of our manufactures without any adequate beneficial result to the workmen as a body; and, because they often exercise their power in tyrannizing over the employers in an inexcusable manner. Much, however, as we disapprove of them, it is impossible to deny that

they have now become permanent institutions amongst our labouring classes; and that any attempt to suppress them by the strong arm of the law would occasion something very like a revolution, and that without any chance of real success. And it must not be forgotten that trades' unions are not without their good results. Many of them unite the functions of benefit societies with those of trade associations, affording relief to their members in times of sickness; assisting them, when disabled by accident; making good loss of tools; granting assistance to, and finding employment for members out of work; and in some cases assisting members to emigrate, thereby easing an overstocked labour-market. During the severe winters of 1865-66, 1867-68, the shipwrights, the engineers, the boiler-makers, and the carpenters were enabled to maintain themselves almost wholly without public relief. In the year 1867, the engineers alone expended 58,243*l.*, and the ironfounders 35,272*l.*, in donations to members out of work. The important service thus rendered to the public is beyond all question; whilst it tends to render the men themselves more provident and independent as a class. But, as is well pointed out by the dissentient Commissioners in their "Statement" (p. xliii.), the above are forms of benevolent assurance which nothing but a trades' union could afford. No association could guarantee assistance to members in cases arising from the state of the labour-market, unless it had some effectual means of controlling that market; and of ascertaining that the want of work was absolutely involuntary and inevitable. So with the superannuation fund. It is obvious that this is a benefit of great public utility, sparing the community at large a heavy burden in poor rates and infirmaries alone. The evidence of actuaries shows us that this could not be attained on mere mercantile principles, except by a payment which would deter nine workmen out of ten from



assuring. The unions can do it at a singularly low rate, because they alone have the requisite means of ascertaining, by actual evidence, whether or not the claimant fulfils the condition of being unable to work, and because a very large number of the union members who are qualified to come on the fund, decline to do so from a feeling of good will towards it.

Recognizing, as we do, the advantages as well as the disadvantages of trades' unions, we cannot help coming to the conclusion that the best form of legislation for them would be that which would most conduce to render them consistent with public policy. We think that they are entitled to protection, and to a freedom from all restriction, but that they do not require or deserve any positive encouragement. In our opinion, their funds should be protected, even though it be taken for granted that they are wholly injurious, because it cannot be right that a man should be allowed to steal or embezzle the funds of his fellows with impunity, merely because he and they have entered into an agreement which is void or illegal in the eye of the law.\* We protect the persons and property of our criminals; *a fortiori* should we protect the property of men who have combined for purposes which are not *mala in se*, and which are only partially *mala prohibita*.

So, we think that the existing law against combinations should be entirely changed. We would give the most perfect liberty, both to masters and men, to combine together to do any act, or to effect any purpose, which

\* See the observations of *Kenyon*, C. J., in the stockjobbing case, *Sanders v. Kentish*, 8 T. R., 165. The temporary Act of last year (32 & 33 Vict. c. 61) may be insufficient to protect the funds of unions, even whilst it remains in force. It is believed that a case will shortly come before the Court of Crown Cases Reserved, in which it will be sought to have a conviction for larceny of the funds of a union quashed, on the ground that "a person cannot be convicted for embezzlement as clerk or servant to a society which is illegal." See *Russell on Crimes*, 4th ed. 442, citing *Reg. v. Hunt*, 8 C. & P. 642.

would not be criminal if attempted to be done or effected by an individual; and we would require every trades' union to be registered. By so doing, these associations would be deprived of all the traits of secret societies, which are under the ban of the law, and this would tend to improve their general character, and would remove a fruitful cause of discontent amongst the classes of which trades' unions are composed. When once they enjoyed a perfect immunity, they would be compelled to court publicity; and, under the influence of public opinion, there is reason to believe that all malpractices on their part would speedily be discontinued.

Further than this we cannot go. And, if so much be conceded to the unions, all attempts on their part to interfere with the liberty of the individual should be suppressed by the action of the law, but the action should be against the persons making the attempts complained of, and not against the unions of which they may happen to be members. If it could be shown in any case, that unionist workmen had committed an outrage upon a non-unionist, or upon a master, which would have been a criminal offence if committed by any ordinary person upon another, then the offenders should be punished, but not otherwise. In a word, we would make no distinction between the acts of individuals and the acts of combinations, but at the same time we would enforce the criminal law against individuals, who rendered themselves amenable to it by trade offences, with as much, or even more, stringency than at present, and that, whether the offenders were unionists or non-unionists.

This we hold to be the only true way of solving the difficult question of how to deal with trades' unions; and we therefore think that the general principles involved in Mr. Hughes's Bill are correct, and deserve the support of all parties. Some of the auxiliary provisions of the Bill appear to require considerable modifications, but these space will not allow us to point out.

In conclusion, the reader should consider the proposal, which has been made in some quarters, to incorporate trades' unions. This would appear to be in many respects desirable, as it would give them a power to contract, and to sue and be sued, and would greatly tend to assist the operation of the boards of conciliation which are so well spoken of in the report of the Royal Commissioners. The only question is, how far the plan is feasible. We confess that we entertain serious doubts on this point.

---

#### ART. X.—THE WORKS OF GEORGE COODE.

**I**N the Obituary contained in our last number we noticed the death of George Coode, and some of his works. But the topic is one which requires more consideration, both in justice to him, whose merits deserve marked recognition, and in justice also to The State, which might otherwise be deprived of the labours of one of its serviceable sons in matters of great and permanent concern.

At this time we are suffering from the accumulation of matters, the remanets of past times, chiefly through the want of knowledge of the principles and methods on which they should be settled.

Coode was one of those personages who could, or would, do nothing without thought of the deepest character. Everything that he touched passed through the alembic of his mind, was carefully collated with the abundant knowledge which he possessed on most subjects, and finally determined judicially, with calm and severe impartiality.

The mere inspection of the titles of his writings would show that they ranged over the entire field of statesmanship so far as it relates to domestic matters, and, as they rested on principles of practical jurisprudence, did indirectly tend to solve matters of international concern. He regarded

all humanity in every phase, and was not satisfied with aspiration, but must needs realise practically what he conceived to be desirable. His position led him to consider matters in practical detail, in the way of administration and in the way of legislation, in form of every kind, and in corresponding expression down to the minutest details of logical and literary treatment.

Having at one time digested "The Whole Body of Poor Law"—a work of which by some singular blindness the country has been deprived—he touched the whole field of law, and gave it an embodiment which met at once the comprehensive objects of the jurist, and the apprehensive objects of the practitioner. These opposite conditions, so difficult to fulfil, he mastered, and if his work had been adopted he would have solved to the satisfaction of the opposite parties the question of digestion of the law, and would at the same time have given the most exact verification of the minutest details for the consideration of the most doubting and accurate sceptic.

His Appendix to the Report on Local Taxation, in which he embodied the law of twenty-four taxes, a matter of present interest, and it is believed of immediate concern, is another proof of the positions above averred. But it was not only in these excellent performances that he showed his highest ability, that of a shrewd and penetrating, diligent and scrupulous investigator, it was the same whatever he touched; the superficial was with him but an evidence of the underlying causation, which he pursued to its lowest depths, and in like manner he tracked through past periods to the remotest the very germ of the question, and its progress thence to the present time, and with keen sagacity predicted the future.

It is with an eye to such valuable qualities that his works should be read; they should be collected, and studied for the treatment as well as for the matter, for in these days of precipitate legislation it is necessary that both treatment

of research and the resulting product should be equally considered, since it is in both respects we fall into difficulties accumulating at every step of our progress.

In the space we can afford in this publication we must not attempt to give a complete analysis of so many works of so wide a range; we shall therefore content ourselves with giving, in the manner of a catalogue, an account of them, that those who may have occasion to prosecute these subjects may know where to seek their material, and their method.

- (1.) The Irish Poor Law Act.
- (2.) Article on the Poor Laws in the "Encyclopedia Britannica."
- (3.) Report of Local Taxation, and Digest of the Laws relating to Twenty-four Local Taxes.
- (4.) Treatise on Legislative Expression.
- (5.) Report on the Law of Settlement and Removal.
- (6.) Papers on the Consolidation of the Law.
- (7.) Report on the Fire Insurance Duties.
- (8.) Memorandum on the Application of Limited Liability to Joint Stock Banks.
- (9.) Article on the Income Tax in the *Edinburgh Review*.
- (10.) Report on Education.

These are among the number of Coode's Works. Many others there are which were part performances with other persons, in which by no means the lesser part or the least worthy formed his share. These are therefore not cited.

It would, as we have said, be in vain to notice the above works *seriatim* in our publication, so limited in space, we will therefore notice some of the most important, and most relative to the matters, of which we take special cognizance; of such are the Papers on the Consolidation of the Law contributed to the Statute Law Commission; they require to be read in the true sense. They were singularly able—too able—for the perfunctory efforts, if efforts they were, made accomplish the greatest and most necessary task of the

times, upon which every individual enterprise in legislation depends for its success.

The pending question of Irish tenures is one such instance. The speciality of that question is the adjustment of the rights of owner and occupier. The means of adjustment is a tribunal. The tribunal must have its basis in economy and law—the two great divisions of jurisprudence. But these are as unascertained, and by present means as unascertainable, as are the very matters of right with which the tribunal will have to deal. The personages who will have to preside over the administration of the tribunal, that is, the greater number of them, will be without this basis, groundwork, and framework.

It is so in other cases; we want, first, a knowledge of economy—not political economy simply, but the organisation, natural, conventional, legal, mixed, exceptional, and exceptionable, which make up the state of things; then the law—universal, common, general, special, individual, and particular, by which the rights growing up under that state of things are enforceable and to be enforced; then, the judiciary—imperial, national, local, general, and special; and, lastly, the courts or places where justice is to be administered.

Unfortunately we reverse the processes, and render each impossible by enveloping each earlier one in a skin or garb too scant for its efficient and complete being.

Coode's efforts, so comprehensive, yet precise and clear, so methodical and practical, would have compassed the matter, and obtained for us a combination of needful results which it is hopeless to obtain by any process hitherto adopted.

The Irish Poor Law Act, Chief Justice Blackburn was accustomed to say, was the only Irish Act that he had met with that was self-interpretative. It is a model of practical legislation, but it is but one of the masterly pieces of legislative draftsmanship which, in his official career, he contributed to the public service.

Nor was it mere draftsmanship. His notes to the Act exhibited a full knowledge of official economy, and much shrewd practical suggestion for the conduct of the work. In all his legislative work he accompanied the provisions with well-informed and masterly expositions of the matter, on which the Minister and the Law Officers of the Crown felt that they could rely.

The work on "Legislative Expression" develops a plain but very logical expedient for rendering intelligible and simplifying our legislative enactments, which may be described as a suggestion not to place the cart before the horses, or one horse before and another behind, or on the side; in short, as the manner of our legislation has been, anyhow. It is simply to place the predicament before the consequence, and, in the former to use the expression of case, and in the latter, the expression of enactment. For the exposition of the suggestion and the grounds of it, it would be as well for the reader to refer to the book.

The work on "Local Taxation" shows, in detail, the method of collecting the matter of undigested law, whether in text, book, case, or statute, and placing it in such form as will secure the insertion of every point, as far as is necessary, but not further or otherwise—the exact matter and no more. A few persons trained to the use of these methods might easily accomplish a very large amount of digestion under the direction of some master lawyers. What is difficult to establish at first may be more readily learnt by the examples given.

In the other papers and Reports are curious exemplifications of his keen reasoning. Instead of resting suggestions merely on what has been done already, or the existence of what are commonly called facts, according to ordinary apprehension, he shows what other facts would have been if such so-called facts had not had place, and is at the same time careful to disparage that suggestion of mischief which is usually attributed to what is but care-

ful selection of one-sided appearances, in disregard of the range of circumstances which have contributed to the production of the actual state of things. In so doing he has by his impartiality sometimes succeeded in winning the opposition of all sides, which later experience has proved to be ill-founded, and as short-sighted as ill-founded.

We need sadly a basis of investigation in all our public inquiries, a method which commonly applied would fairly gather up the elements of the question, and so present it that the public at large, unaffected by partisan views, might assist in forming a judgment on which action, administrative or legislative, might be taken with safety. A study of the Reports of Commissioners, so often abortive, would show the value of this view. It is in this sense and to this purpose we should recommend a careful perusal of these works.

Of those which we refer to it may be observed, that they touch on the personality of everybody, and the state and condition of every class of persons; on property of every kind, and the incidents of ownership and occupation; on commerce, foreign and domestic; on functionaries of every sort; on the use and abuse of our tribunals of various kinds, and of the sundry aggregations and congregations of communities, which make up the great whole—The State.

The whole of our social economy comes directly or indirectly under consideration, and the processes by which they may be treated legislatively are discussed both on principle and in detail. 'Tis a pity that so much thought and practical ability should be lost, for so it must be (to some extent at least), since it is a mere impossibility that any other person should pass through the same career of experience—that is, from the state of things which existed before the passing of the Poor Law, and which followed thereon, and which in Coode's case has been pursued by one who was an accomplished logician, jurist, and



practical lawyer, and a skilful official as well as conversant with private concerns of every variety.

Doubtless his case is not singular; others have shared the same fate, and so will many who are now living. We cite it as an instance of our blindness and disorderliness. "A little more sleep, a little more slumber," is ever the cry of the political sluggard, whom we would wake up to a sense of the perils of his lazy '*laissez faire*.'" The worst of it is that our haphazard, gossippy style (not of work, but) of thoughtlessness, plunges us into a sea of mire, helps nothing but a perpetual drift towards undoing, without its compensation, the establishment of a system truly efficient and economical. One statesman after another, yielding to the pressure of the moment, breaks up a system, and before its substitute can be established gives place to a successor, who as madly yields to the cry of failure, which is always urged when reform is in the throes of transition.

The Gathering together in apt order the past, the present, and the coming, is peculiarly the duty of the official whose province it is to carry forward the traditions of The State, and to facilitate fresh effort by an accessible collection of the experiences of each successive period. We are spending a deal of money in re-collecting ancient records (a task worthy of the labour and the cost); we spend none in the apt collection of the current records, which is about the best means of training statesmen for the ever-pressing claims of each succeeding age. Whether one is Conservative, Whig, or Radical, there is the same want, equally fundamental and indispensable, of a more brotherly fellowship of workers in the same direction, which is, perhaps, not to be expected from our Saxonly isolation, and from the keen competition of modern times, but it is not the less regrettable. And we would fain hope that the losses which The State incurs by such instances as the present may incite somebody or other to stem the drift of indifference to the welfare of

those who are to come after us. To save a penny in the Income Tax may be worthy of every patriotic exertion, but to lay the foundations of the welfare of our progeny at an equal cost would probably be worthier.

We understand there is some hope of the Papers of Coode falling into friendly hands, which will not willingly suffer their practical value to be overlooked.

---

ART. XL.—THE FRENCH BAR.

*An Historical Sketch of the French Bar, from its origin to the present day, with Biographical Notices of some of the principal Advocates of the Nineteenth Century. By ARCHIBALD YOUNG (Advocate), Edinburgh. Edmonston & Douglas. 1869.*

AT a time like the present, when changes are taking place in the administration of the law, and when, as incident thereto, some changes, the extent of which it is not easy to measure, may take place in the organization of the legal profession in both its branches, the appearance of Mr. Young's book is most opportune.

In reading this most interesting and unpretending work, one cannot help being struck with the great differences which exist between the two professions in our own country and in France. Taken broadly, the ambition of the English barrister is to become a judge; he may have to be satisfied with something far short of that exalted dignity, but at the outset of his professional voyage the Bench is his goal, and "very sea-mark of his utmost sail." Political life, purely as such, with very rare exceptions he does not venture upon. The reason for this is partly due to the fact we have stated, and partly due to other causes, and among others to this, that political life in this country is the profession of the highest in station or the wealthiest in purse. The portfolio of the minister, on the other hand, is the

ambition of the French advocate. The Bench in France is not recruited from the Bar, nor does it hold in public estimation that almost sacred place that it does with us; and, further, the social position of the judges is not so high as in this country, nor are the emoluments of the French judges upon the same scale. It is therefore to political life that the advocate in France looks, and in that he centres his hopes.

The work before us, within a compass of some 250 pages contains much varied and interesting information. If we may find fault with so admirable a book, we should say that it was somewhat overlaid with dates and detail. But, as the author terms the volume a *Sketch* of the history of the order of advocates, as well as of the biography of many of the illustrious members of the French Bar, perhaps this was unavoidable. The book travels over a great extent of ground, or rather of time, it speaks of events of great interest and importance, and traces diligently and lovingly down the stream of some five hundred years of history, the course of that great profession, the eloquence and ability of whose members have done such splendid service for France.

That the history of an "order as ancient as the magistracy, as noble as virtue, as necessary as justice," should be interesting is but natural. But the history of the French Bar is something more. It is the history of the courage, the devotion, and the patriotism of many of the foremost men of their country, it is the history of the growth of liberal opinion, of enlightenment, and civilization.

The profession of advocate in France dates from a very early period, and although existing as a separate order earlier than the reign of Philip the Fair, the reign of that monarch is a very important epoch in the history of the French Bar. Philip made the Parliament stationary, which formerly had followed the person of the king, and thus he greatly increased the power and influence of the Parisian Bar.

To a somewhat similar circumstance our own Bar owes

perhaps its existence. In this country the 'Bar,' in the sense in which that phrase is commonly understood, cannot be traced further back than the thirteenth century, for it was not until after Magna Charta that the Courts of Law were permanently settled at Westminster, instead of following, as they previously had done, the king's person in his journeys through the country. Speaking generally, the French Bar is a provincial one, scattered over the country, while our own is metropolitan, the system of circuits in this country to a great extent obviating the necessity of barristers settling in different parts of the country.

The growth of business, however, has in England already attracted great numbers of the junior Bar in to the provinces, and as unquestionably the present current of our long needed law reforms sets in the direction of centralization as from many centres, the result will be that our own Bar will become to a great extent provincial also. If this be so, we fear the result will be a degradation of the profession, which one would greatly deplore. The circuit system once destroyed, even the imperfect control the mess at present exercises would be destroyed, and all discipline would be at an end.

No one can read a book such as that of Mr. Young's without seeing how vastly the administration of the law, and how greatly its dignity, depend upon the character and conduct of those who are its ministers.

Already changes are at work (to which attention has been publicly drawn) which argue but ill for the maintenance of the traditionary honour and dignity of the profession in this country. It would be well for the Bar (if for once the body would act as their brethren in France have done repeatedly) to consider, in view of changes which must operate upon them, whether it would not be desirable to organize some new and distinct method of discipline throughout the provinces, in forming local bars, with appointed officers, or some system or machinery whereby professional decorum

and order may be maintained. With this special evil of provincialism to contend against, and under all the changes and vicissitudes through which France has passed, her advocates appear to have maintained unchanged the traditional character, dignity, and political power bequeathed them by their Roman forefathers. This is due, we think, to the more perfect organisation of the profession in France, and to its loyalty to itself. In France the status of the Bar, and the conduct of its members, has been considered matter of imperial concern, and the State has, by positive enactment, laid down rules for its guidance.

Laws have been passed from time to time in France, regulating the conduct of the Bar. One law provides that all arguments calculated to injure the opposite party should be spoken courteously, and another forbids the advocate to make any bargain with the party for whom he pleads for a share of the matter in litigation. This latter rule would seem to resemble our own, save that the rules of conduct which obtain at the English Bar are purely consuetudinary, and the disability which the English barrister lies under from enforcing by action the payment of his fees seems to apply also to the French Bar.\* A subsequent law of Philip the Bold, published in 1274, imposes upon advocates the obligation of swearing that they will only take charge of those causes which they believe to be just, the refusal to take the oath being punished with interdiction. This rule opens up, no doubt, matters which have been subjects of keen controversy, with which we here cannot deal, but we will only say that in our opinion such a rule has only to be made to be practically abrogated. "If an advocate refuses to defend," says Lord Erskine, in his defence of Thomas Paine against the charge of publishing a seditious libel (this was in 1792), "from what *he may think of the charge*, or of the defence, he assumes the character of judge, nay, he assumes it before the hour of judgment."

\* Mollot, "Regle de la Profession," p. 141.

The conduct of advocates in this country has been subjected to very little legislative interference. But a statute lately in force, and for all we know it may be so yet, passed in the reign of Edward I., A.D. 1275, enacts, "That if any serjeant, counsellor, or others, do any manner of deceit or collusion in the King's Court . . . he shall be imprisoned for a year and a day, and from thenceforth shall not be heard to plead in that Court for any man." And further, in that old book, the "*Mirroir des Justices*," c. ii., s. 9, it is, among other things, ordained "That every pleader is to be charged by oath that he will not maintain nor defend what is wrong or false to his knowledge, but will fight for his client to the utmost of his ability." This injunction, our Bar we think, fairly carries out. The second and third articles of the French law which we have mentioned treat of the fee of advocates, which were to be proportioned to the importance of the cause and the skill of the pleader. The fee was never to exceed a sum equal to about 27*l.* of our money.

In the year 1291, Philip the Fair confirmed the enactments of Philip the Bold concerning the fees of advocates and the prohibition to receive anything beyond the amount fixed by law. From time to time further regulations were made with respect to the duties of advocates, and it is almost amusing to read the repeated recommendations and injunctions addressed to the advocates to be brief in their pleadings, prolixity having been evidently a fault with the Bar of France at all times in their history. The limitation as to the amount of fees seems soon to have fallen into disuse, as we find that in 1453 the advocates were recommended to be moderate in their fees. One usage, which obtains in England at the present time, namely, the signature of counsel under the fee marked upon their briefs, was the subject-matter of an ordinance in the time of Henry III., and forms the occasion of a memorable incident. The king enjoined the Bar to write with their

own hands beneath their signatures the amount of fees they received. The Bar refused to obey the injunction, and in truth resented it as an insult, and to show their determined hostility went in a body to lay down their functions, declaring that they voluntarily abandoned the profession of advocate rather than obey a law injurious to their honour. Four hundred and seven advocates in all thus solemnly protested against the ordinance. When the Parliament met there were no advocates to plead and justice was at a standstill. In the end the Bar succeeded. This is a very strong instance of the internal discipline of the French Bar, and of loyalty to their order, and affords, perhaps, the first example recorded of a strike. Be this as it may, we doubt if the Bar here would ever act as resolutely or so completely in union.

Our author thus describes what may be termed the organisation of the profession.

“From a pretty early period in its history the Bar of Paris was accustomed to arrange itself by benches, in order that its members might meet and confer more easily. These benches were placed in the great hall of the Palais de Justice or in the adjacent galleries. In 1711, the advocates, formerly divided into eleven benches, were arranged in twelve. The first was composed almost entirely of seniors, and a few seniors were placed at the head of each of the others, after whom came the younger members, according to the date of their admission into the order. This organisation, however, was found to be very imperfect, and in 1780 the fifth bench contained 101 advocates, the seventh nine, and the eighth seven; while the tenth had ninety-five, and the twelfth ten. In 1781, a reform took place, and the order was divided into ten columns, each containing from fifty to sixty advocates. Each column elected two deputies, whose functions lasted for two years, and who might be re-elected. These deputies from the different columns, along with the former presidents of the Bar, constituted the council of the order, elected its presidents, watched over its roll, and maintained its discipline. The advocates were further divided into three classes—listeners (*avocats ecoutants*), pleaders (*avocats plaidants*), and

consulting advocates (*avocats consultants*). According to the ancient practice, the young licentiate from the University was presented to the court by one of the seniors of the Bar, and the president administered to him the oath to observe the laws, which he took standing upright, in his gown, with uncovered head, and right hand uplifted ; in short, the ceremony of the oath seems to have been very similar to that at present observed at the Scotch Bar. A minute of the taking of the oath was then drawn up and signed by the senior, or, as he was termed in the olden times, the godfather of the young jurist. After taking the oath, the advocate might assume the gown, but he had not yet the right of pleading. He entered upon a period of probation, called *le stage*, which, by a decree of May, 1751, was extended to four years. Upon the lapse of this period, his name was inscribed in the roll of advocates upon the report of one of the chiefs of his bench or column. The pleaders (*avocats plaidants*) were highly respected, and had the right, not only of appearing in the Courts of Parliament, but also in all the inferior judicatories. The mutual exchange of papers was considered one of the courtesies of the profession, and, before pleading, the advocates were in the habit of making extracts from their briefs, containing the facts of the case, and communicating them to the opposite counsel. Pleading and consultation for the poor was one of the established rules of the ancient Bar, and every week nine advocates met in order to hold gratuitous consultations on the causes of the poor. The advocates, as at present, spoke with their heads covered, except when they pleaded before the King's Counsel. The consulting advocates—*advocati consilarii*, as they are termed in the old ordinances—held the highest rank at the Bar. They gave their advice to the pleaders, they regulated the affairs of families, and were entrusted with many matters of the highest moment. They had a bench set apart for them in Parliament, and were entitled to a seat on the *fleur de lis*. The head or president of the French Bar was, and still is termed a *bâtonnier*. This title dates back to the middle of the fourteenth century ; but for a long time after that period it was an office of little importance. The name is derived from an ancient usage, according to which the staff (*bâton*) of the banner of St. Nicolas, the patron of the confraternity of advocates, was carried at the head of the order in processions and cere-



monies. He who carried it was termed *bâtonnier*. So late as 1602, however, the dean (*doyen*) held the first place at the French Bar, the *bâtonnier* only the second. The latter is mentioned for the first time as the head of the order in 1687; and it is only since July, 1693, that he has had a legal title to be considered the head of the Bar. Formerly, the senior member of the order, by date of inscription on the roll, used to be elected *bâtonnier*. But as the great age of the advocate thus chosen often unfitted him from efficiently discharging the duties of an office requiring watchfulness and tact in no ordinary degree, the order determined to give up this principle of election. The *bâtonnier* is chosen for one year only; but since 1830 it has been usual, at the close of his first term of office, to re-elect him for a second year. The *bâtonnier* has the privilege of making his business appointments at his own residence, even with those who are his seniors at the Bar. The title of dean (*doyen*) belongs to the senior member of the Bar inscribed on the roll; but it confers no other privilege than that arising from seniority. The *bâ'onnier*, the former *bâtonniers*, and the deputies from the columns form a council, which meets in the Advocates' Library, and whose chief object is the preservation of the discipline of the order. The *bâtonnier* himself adjudicates upon trifling complaints against members of the Bar; but if the matter is of consequence, he reports it to the council. If the suspension of a member, or the erasure of his name from the roll, is to be deliberated on, the *bâtonnier*, after examining into the matter, reports to the Crown counsel, and their decision is registered. In the most important and serious cases, the court is petitioned to give judgment in terms of the requisitions of the *bâtonnier*, and the conclusions of the Crown counsel. At the expiration of his term of office, the *bâtonnier* makes up the roll of advocates, with the assistance of the former *bâtonnier* and the deputies, and deposits it in the register before the 9th of May."

We have not space to recount the chequered fortune of the Bar, its destruction at the Revolution, and its restoration under Napoleon, but we must pass on to that portion of Mr. Young's work, which doubtless may be considered the most interesting, namely the biographical notices of some

of the many great men who have graced with their eloquence, or dignified with their learning, the ranks of the profession in France. Among jurists the names of Cujas, Pothier, and Portalis will ever be honoured, and the labours of the French Bar in jurisprudence are eminently worthy of recognition. Pothier was born at Orleans, in 1699. He completed his legal studies in the University of that city, and was appointed Councillor in the Presidial Court of Judicature at the age of twenty-one. In 1736 he commenced his great work on the Pandects, which occupied him during twelve laborious years. In this immense task he had the help of some of his intimate friends, among others of Prevot de la Janés, his colleague in the Court, and Professor of French Law. Upon the death of his colleague Pothier became professor, and his able and enthusiastic teaching speedily gave a remarkable impulse to the school of law at Orleans. For twenty-five years Pothier presided over it, and educated many of the first advocates and magistrates of France. The mantle of Pothier, as a jurist, seems to have descended upon Portalis, who was, perhaps, the ablest lawyer and most upright man who took part in the preparation of the Code Civil. The public life of this distinguished man did not commence until he was more than fifty years of age, and during the whole period of his great labours as a jurist and politician he was almost totally blind, unable either to read or write, his extraordinary memory, however, making up for this defect.

But whatever may be the claims of the French Bar to be considered learned, however much their labours may have added to the science of jurisprudence, it possesses the gift, we were nearly saying the "fatal gift," of eloquence to an extent which removes it far above all competition with our own.

Mr. Forsyth, in his "*Hortensius*," points out that until the magic of Erskine's voice and eloquence was heard in our Courts, the annals of our great trials do not furnish us

with much, perhaps hardly anything at all, worthy of the name of eloquence. If this was the case before the days of Lord Erskine, what have we had since? It is true that Lord Brougham treated our Courts to some powerful and meteoric flights of what was termed in his day eloquence, and thundered forth in both our Houses of Parliament powerful and weighty orations which, in our opinion, did contain, among much, very much, that was extravagant and turgid, here and there passages of great beauty. But his speeches are drugs in the market, and his memory remains with us secured on other, it may be deeper, foundations. Since Lord Brougham we have not possessed half-a-dozen advocates as orators of any real mark. The late Lord Chief Baron, the present Lord Chief Justice, Lord Chelmsford, and perhaps pre-eminently Serjeant Wilkins, found no competitors, and have left no successors as orators, however able as *nisi prius* advocates the present generation of our leaders at the Bar may be.

The national character is ponderous, and he who can nonsuit by an array of cases, or set aside a verdict "upon the authorities," is as much, if not more to the taste of the English attorney (who, after all, is the *deus ex machina*), as the glib, agile Q.C., who makes a jury laugh with him.

The national characteristic to which we have pointed accounts for some of the differences between the two professions. But we cannot help thinking that, beyond this, the French possess a far more worthy appreciation than we do ourselves, of the duties, the responsibilities, and the dignity of the advocate's calling. The tradition of their political power, the result of splendid service, the independence of their profession, their social status, all these furnish bonds of brotherhood, while the old custom of the interchange of papers (one of the oldest of their ordinances), and the ready joint action of the whole order where their privileges or their rights seemed to be in danger, show the confidence they possess in each other's loyalty and honour.

We have hardly space to mention the names even of the more eminent among them, whose reputation as orators still survives, and whose speeches are remembered. Among others, Pierre Séguier (one of whose descendants, the Baron Séguier, so recently resigned his office of Procureur-Imperial in the Court of Toulouse); Omer Talon, in the 16th, Servin and Antoine Lemaistre, in the 17th, and D'Auguesseau towards the close of the 17th century, are well known. Of these D'Auguesseau is the best known. This eminent advocate was born at Limoges, in the year 1668, and was appointed King's Advocate at the Châtelet of Paris at the early age of twenty-one. How true is the saying, "that the history of greatness is the history of youth." Distinction at the French Bar has been, in the great majority of cases, attained at an age which, in this country, would be barely sufficient to entitle a man even to hope for an assize prosecution for burglary, or an undefended cause in Middlesex. At thirty-two years of age D'Auguesseau was made Procureur-General, and Chancellor of France at forty-eight; a success almost as rapid as that of Grotius, who pleaded at the Bar when only seventeen, and was made Attorney-General of the Netherlands at twenty-four.

The discourses of D'Auguesseau are well known. In his magnificent eulogium upon the Bar occur those words, a portion of which we have already quoted, and which we will repeat. Speaking of the Bar, he says:—

"It is an order as ancient as the magistracy, as noble as virtue, as necessary as justice; it is distinguished by a character which is peculiar to itself, and it alone ever maintains the happy and peaceful possession of independence."

Passing the great names of Normand and Cochin, contemporaries of D'Auguesseau, we must for a moment pause at that of Gerbier. This great advocate did not commence to plead in the Courts until he was twenty-eight years of age. But his rare merit soon placed him at the head of the Bar.

In his time we first begin to catch a glimpse of the lucrative character of the profession in France. It is said that he received a fee of 4000*l.* (about 100,000 francs), from the Company of the Indies, and 20,000*l.* from a *Sieur* Cadet, for whose cause he had pleaded successfully.

Mr. Young has here a note upon the fortunes made at the English and French Bars, and compares them with those amassed by the advocates of Rome under the empire, very much to the advantage of the latter: but it is by no means clear that the fee system, as we understand it, obtained at Rome at all, and regard being had to the *then* value of money, the amount of these sums appears to be enormous, very many times beyond any legitimate fee we think ever given in England.

At the time of the Revolution, when the Bar was abolished, after the law of August 16, 1789, under which every one was to have the right of pleading his own cause for himself, one and only one in the Constituent Assembly stood up in their defence, and that one, Robespierre.

"The Bar," said he, "seems still to display liberty exiled from the rest of the world; it is there that we still find the courage of truth, which dares to proclaim the rights of the weak and oppressed against the powerful oppressor. The exclusive power of defending citizens shall be confined by three judges and three lawyers! In that case you will no longer behold in the sanctuary of justice those men capable of rising to enthusiasm in behalf of the cause of the unfortunate, those independent and eloquent men, the support of innocence, and the scourge of crime. They will be repelled, but you will have welcomed lawyers without delicacy, without enthusiasm for their duties, and only urged on in a noble career by sordid considerations of interest; you mistake—you degrade—functions precious to humanity, essential to the progress of public order; you close that school of civic virtues where talent and merit learned, while pleading the cause of citizens before the judge, to defend thereafter that of the people in the legislative assemblies."

Resuming the path of our history from which we turned aside for the moment, we find between the time of Gerbier and the present, materials that might well afford matter for a lengthy paper—the trial of Louis the Sixteenth and that of his queen, the reorganisation of the Bar under Napoleon, the trial of Marshal Ney, and the revolution of 1830; but the Bar of the nineteenth century must claim our remaining space. Hennequin, Berryer, *père et fils*, the brothers Dupin, Dufaure, Garnier-Pagès, Ledru-Rollin, Baroche, Rouher, Jules Favre, Emile Ollivier, with many others, are names with which we are familiar.

Hennequin was engaged in almost all the great trials which took place between the years 1814 and 1834. Among them were the celebrated cases of the disputed succession which followed the death of the Prince of Conde, who was found hanged in his chateau in the August of 1830, and with whom perished the great house of which he was the last representative. Two years after he undertook the defence of the Duchesse de Berri, who had been arrested while vainly endeavouring to rekindle the smouldering embers of civil war in La Vendee. About this time, Antoine Pierre Berryer began to rise to fame. No name is so well known as his. This distinguished man was for many years the undoubted leader of the French Bar, and to him the Bar of our own country has paid reverential honour. The father of Berryer, an able and distinguished advocate, defended Marshal Ney, and the position of the father naturally paved the way for the son. Berryer's life, as that of nearly all the greatest advocates in France, is as much political as forensic. And this characteristic of the French Bar makes its own history almost the history of France.

Among many great political trials in which M. Berryer was engaged, one stands out far above all others in interest—we mean the trial of the present Emperor of the French, for his attempt at Boulogne. In 1852 M. Berryer was

elected Bâtonnier of the Parisian Bar; and, so late as 1858, defended Count Montalembert, who was prosecuted by the Government for certain alleged libellous expressions contained in a newspaper. We most of us remember M. Berryer's visit to Lord Brougham in 1864. Upon that occasion the Bar entertained the two venerable advocates at a banquet in the Middle Temple Hall. His last appearance in the Legislature was in February, 1868; on November 29 following he breathed his last. To the last a Royalist, upon his death-bed, after receiving the last sacrament of the Church, he wrote that touching letter to the Compte de Chambord, which now is matter of history.

Louis Garnier-Pagés and Ledru-Rollin are known to us rather as politicians than barristers, and MM. Thiers and de Tocqueville have achieved a fame, broader and wider than that which the Bar alone can give. Two names of men living among us claim our notice, and with them our imperfect notice of Mr. Young's book must close.

Jules Favre, at present the acknowledged leader of the democratic party in France, and one of the most consummate of living orators, was born at Lyons in 1809. His speech before the Court of Peers in 1835, on behalf of those who were implicated in the fatal disturbances at Lyons, one of great eloquence, marked him out at once. On the retirement of the famous Abbe Lammennais from the management of the journal *Le Mouvement*, M. Favre became one of its chief political directors. In 1860 and 1861 M. Favre was elected Bâtonnier of the Parisian Bar. M. Favre is one of the most consummate speakers of modern times. He has acquired the art in its every branch, and possessing a profound knowledge of his own language, moulds it with a delicacy of finish that is, perhaps, unrivalled.

The present Prime Minister of France, Emille Ollivier, was born at Marseilles in 1826, and was admitted to the Parisian Bar in 1846. In politics a Liberal, his views are

far more moderate than those of M. Jules Favre. As a lawyer he is eminent, and as a speaker, although far inferior to the great democrat, is bold and eloquent.

One quotation we shall give. It is taken from his reply to M. Baroche, in defence of liberty :—

“I affirm,” says M. Ollivier, “that the honourable M. Baroche does not believe in the power of liberty, because he sees only its excesses. These excesses I also, like him, acknowledge and detest. But, for the same reason that we do not forbid the use of fire, because it burns as well as warms; for the same reason that we reject not religion, because there are wicked priests, and justice, because there are false sentences; for the same reason that we condemn not marriage, because there are adulterers; for the same reason that we refuse not to commence a voyage, because we may encounter tempests on the sea instead of propitious winds and starry skies: For the same reason I do not understand why we should proscribe liberty on account of its excesses! In all worldly things the good and the bad are found side by side. We must have the manly courage, when we follow the good, to accept the difficult conditions of strifes and efforts which are the beauty, the glory, the dignity of great undertakings. Royard-Collard has said so, and yet he was no demagogue. Constitutions are not tents set up for sleep; governments are not places of repose, where one’s days may glide away in tranquillity, without care or anxieties; they are posts of honour, because they are posts of battle and of danger!”

Our task is now done. Imperfectly as our work has been executed, we hope, nevertheless, that this mere outline that we have been able to lay before our readers may induce them to read a book, which apart from its own merit, and this is considerable, has an interest we venture to think very far beyond the limits of the profession to which it is more especially addressed.

---



## ART. XII.—SANITARY LAW.

IF the Royal Sanitary Commission arrive at the conclusion that existing laws are adequate to meet the exigencies of public health, there still remains a question imperatively calling for an answer; and we may hope that the result of the inquiries of the Commission may show us why it is the present system of sanitary law so signally fails in its practical working and application. Amid all the contentions as to the proper disposal of sewage, the differences between subsoil drainage and sewerage, the water and earth systems, the constant and the intermittent supply of water, public against private holding of water and gas, we have at least found this unsatisfactory standpoint, that the health of the community is below its proper standard, that its mortality exceeds the necessary rate, and that much suffering and destitution is incurred by the body politic which might be avoided. But here agreement seems to be almost at an end, and we are launched into a sea of conflicting opinion; as much on the physical as the legislative aspect of the question. It must be useful in a summary manner to lay before our readers for their careful consideration how the matter stands. The three great requisites of pure air, pure water, and pure food, are the *necessaria* of sanitarians. How far these are protected by sanitary law it is almost irrelevant to inquire; how far they are provided by local authority is of national importance. The local authorities are as diverse as the laws under which they are established. We have a Local Board of Health under the Public Health Act, 1848, Local Board under the Local Government Act, 1858, Sewer authorities and Nuisance authorities under the Sewage Utilisation Act, 1865, and Sanitary Act, 1866, and Boards of Guardians and Highway Boards under the

Nuisances' Act, besides bodies established as Improvement Commissioners under local Acts, and though last, not least, we have the Secretary of State for the Home Department, who, under the Sanitary Act, 1866, may become an efficient board in himself (although even yet without the necessary power to collect the moneys he may expend), and execute works of water supply or drainage of any magnitude, as he himself is the judge of the necessity. These various bodies have a quasi-supervision, either by the Local Government Act Office, or the Medical Department of the Privy Council; and it not unfrequently happens that, in the very same locality, one of these bodies before-named is in correspondence with one Government body, while another local authority, aiming at the same object, is in correspondence with the other for the same purpose.

It appears to the writer a matter of perfect impossibility to say where the authority of any of these bodies ends, and the authority of the other commences, for it is not at all unusual for two or even three to co-exist at the same time and in the same locality. There is one step certainly gained by late legislation, that every place in the kingdom which has a known and defined boundary is supposed to have a local authority, but this, while apparently compulsory, is really simply permissive, as no authority exists which has the charge of enforcing the law or providing a remedy for its non-observance. These bodies have to administer twelve Sanitary Acts proper, but how many incidental Acts we are afraid to say, but directly or indirectly they cannot be far short of a hundred. So loose has our system become of incorporating with an Act for a given purpose fragments of other Acts, in which clauses are to be found apparently suitable to the end proposed, that to carry out one we are continually remitted to the provisions of a dozen others. It is, therefore, a matter of no surprise that the ordinary intelligence of a local authority should be a little bewildered in attempting to administer these Acts

and even higher authorities, namely, our judges, have expressed their inability to reconcile their various and often conflicting enactments. To add to these difficulties, the boundaries of these bodies moving over the same ground are not conterminous, so that, while at present there is no available record of sickness, the record of mortality becomes often imperfect as a sanitary guide, and from the mixture of town and country, and sparse and dense populations in different parts of a given area of sickness and mortality, the whole subject of entirely different sanitary aspects and conditions is rendered complex and uncertain. The subdivision of the whole empire into sanitary districts, with one local authority, becomes, therefore, extremely desirable, nor is it less so that the various sanitary enactments should be consolidated into one well-considered measure. This is very different from enlarged powers,—it may curtail some existing, but at the least it would provide a power, in fact and in action, for what is now simply a paper constitution, with imaginary officers, discharging imaginary duties of health preservation. When the Public Health and Local Government Acts were successively called into being by the legislature, and Local Boards of Health, or Local Boards were established under their provisions, the settling of their boundaries was a most arbitrary matter, dependent often upon any circumstance rather than sanitary requirement. Experience has shown that, while rates are to be collected equally over the whole area of a district unequally treated by a local authority, it is not only unjust, but in truth leads to the very defeat of the end, namely, health preservation, by awakening the determined opposition of rate-payers, who resolve not to pay money in return for no benefit. To alter boundaries at present existing is but ill provided for in the various health statutes. This is a part of the present system that requires careful revision, if the larger measures we indicate are not provided

for. This at once brings us to the question of a central authority. We have shown that at present there are two. The writer thinks there should be but one. The present system either does too much or too little. It interferes, it is true, but only when evoked, or after some dire calamity. Permissive legislation in health matters, as in all others where the action of remedies is to entail expense on those providing them, may at once be dismissed as an error. In whatever matters affecting the body politic, and wherever it has been tried, it has been found to be a failure. And in no degree, place, or time, has it more signally failed than in the endeavour to remedy the present sad defects in the dwellings of the poor, by providing what are called private improvements. It is true that it recognizes their necessity, but it furnishes no funds out of which they are to be executed, nor any authority which can compel their provision.

These improvements fall, no doubt, at first heavily on cottage proprietors, especially as the mode of repayment of the principal sum expended, spread over a series of years, is practically impossible. These very proprietors have immense influence, not only in the election of members to local boards, but as members themselves, and do all they can to prevent self-imposed burdens. To be effective, therefore, these urgent needs must be remedied by compulsory enactments. But here it is certain that at present no such power exists. It is true that by s. 45 of the Sanitary Act, 1866, the Secretary of State may be called into action where there is defective drainage and water supply by any one, be he ratepayer, owner, lodger, visitor, or any other person. But it cannot be too constantly borne in mind that these imperial remedies are but the skeletons; to be life-like, to be clothed with the vigour of action, they want daily, kindly, and careful attention in their subordinate application. Whether we are to have an era

when, with the spread of education, all people are to be thoughtful, self-preservative, and ready to avail themselves of all the appliances put in their way, we know not; but this is self-evident that, unless very carefully watched, the best appliances at the present time soon become either useless, destroyed, or unused. There is more wanted than a water tap to ensure cleanliness, or a window that *can* open to secure ventilation. We want an action more ready than that which tells of poisoned water when there is a decade of victims, or points out the causes of gastric or typhus fever, when the misery of the bereaved and the pressure on the poor-rates calls attention to its ravages—central authority, to direct great measures, to sanction them after due inquiry, to be the great fountain head from which information on all points of difficulty in administering the sanitary laws is to be drawn—to assist, to advise, to control—still leaving local action to do the work—to collect information, to sum up results, to be the medium of communication between various bodies, to govern where local differences and jealousies prevent combined action for the general good. These are the outlines of such action as our present exigencies imperatively demand, and which cannot be provided without an entire alteration of the present system. But beyond all this, and in its way infinitely greater, is the continuous skilled action, which an intelligent medical officer of health, appointed by the local authority, but independent of it, to the extent that his action would not be paralyzed, should bring to bear, by daily continuous attention given by himself and assistants, in using these means for promoting the public health. We may have perfect drainage and sewage, good water supply, and yet not banish fever, or cholera; and consumption and bronchitis may still let havoc in upon us. These great works are necessities, but their utilisation is to be directly enforced, urged on a careless, and it may be an unwilling, population

—a population unwilling because either apathetic or incredulous as to the benefits to be procured.

But are we really sure we can obtain perfect sub-soil drainage or perfect sewerage without some organic change in the present sanitary laws?

We have, not before it was needed, found out that to pass our sewage into rivers, and so poisoning the sources of our water supply—for that to these we must look for our future supply, the Water Supply Commission has abundantly proved—was only a repetition of the former process of poisoning our wells by the cess-pit system; a system the return to which in many places the injunctions placed by the Court of Chancery on drainage into rivers has rendered apparently inevitable. The battle of dry-earth closets, sewage farms, water carrying sewage, gravitation, and pumping, and what not of subordinate questions, are still *sub judice*. Previous sewage contamination, present emptying of refuse, animal and vegetable, into streams, and running to waste most valuable matter, retaining it on the ground, or making it a solid residue leaving purified effluent water: What vistas of difficulty there are here, waiting to be lighted up by actual scientific demonstration of the best and the right mode we should adopt in the future! If water be the medium of carrying off our sewage, how can this be managed without in every case the public body being the supplier of water, for its supply must be compulsory to be efficient, and there are no laws to make water supply compulsory when in the hands of a private company. At present to attempt its introduction into every house would lead but to the theft of the fittings. This can, however, easily be remedied by public stations for water, at convenient distances, with a constant supply; and nothing less than this can ensure an efficient remedy in cases of fire, where at the present no payment is made to the water companies, and, as a necessary consequence, no control over this essential element of safety given to fire brigades or the police. When the Public Health

Act and other Acts regulating expenditure were passed, which limited the money to be spent, except in cases where full public works were executed, to one year's assessable value of the district, it was never contemplated that for every 150 inhabitants at least an acre of land must be provided if sewage irrigation is to become general. This alone in the neighbourhood of large towns would go far to swallow up the entire powers of borrowing, and no power of mortgaging being provided in any of the Acts, all moneys would have to be repaid in thirty to fifty years. This is most unjust; it is burdening the present for the good of future generations. Wherever the corpus of the property remains, such as water-works, land for irrigating farms, land purchased for building offices, or any other purpose, which gives to the district property what may, at a future period, be again converted into money, this obnoxious provision of repayment should be removed. Whatever lightens the burden of health rates it is most essential to provide. Whatever unnecessarily increases the burden it is most essential to modify or remove. If sewage farms are to become general; if water is to be provided by the municipality; if gas is to become a matter of public supply; then our present enactments as to borrowing and repaying money must be largely altered. Our present general sanitary powers may be adequate, but they are ill assorted, conflicting, complicated, and press too heavily on the taxpayer of to-day. They require simplification and consolidation; and their most urgent requirements are—complete central authority, local action by one body in a given district in all matters affecting the public health, re-distribution of districts, and altered modes of securing moneys borrowed, and provisions for repayment. No subject for legislation more urgently demands attention, or promises more valuable returns for careful and thorough legislation.

## Notices of New Books.

---

[\*.\* It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in more elaborate form, in a subsequent Number, when their character and importance require it.]

---

The Lives of eminent Serjeants-at-Law, of the English Bar. By Humphrey William Woolrych, Serjeant-at-Law. 2 vols. 8vo. London: Allen and Company. 1869.

MR. SERJEANT WOOLRYCH has, in this work, made a most welcome contribution to our store of legal history. He has supplied two volumes of biography, certainly as interesting and entertaining as any that have appeared for a long time.

The lives of distinguished lawyers have, for the great crowd of general readers, a special charm. Just as without any mere professional or personal inducement, nearly every class of readers fastens on the columns of our newspapers, in which are recorded the Reports of the Law proceedings of the hour, so we find very few persons of any intellect to whom sketches of legal life are not welcome. The lawyer's career, with its chequered course of failure and success, the race for distinction, wealth, and power, the sayings and doings, the witticisms and the jokes, the *on-dits*, the slanders of Westminster Hall, have attractions beyond the ranks of the legal profession. The world outside likes to hear and read of the great struggles going on, or that have taken place in Westminster Hall, and an insight into the lives of those who have played their parts in the thousand dramas of the Temple of Themis cannot fail to attract readers of any intelligence or education. Books, indeed, of small merit in themselves, in which legal annals and legal anecdotes are strung together, have, in their time, been among the most popular productions of the press.

In Mr. Serjeant Woolrych's Lives of the Serjeants we have before us the career of eminent lawyers who, at different periods, have played their parts in Westminster Hall, many of them the principal stars that shone there, some identified with a still wider field, politicians, statesmen, men of literary tastes, and men of the world.

The learned author selects from the list of eminent members of Serjeants' Inn fifty-eight names, and there is not one among them whose biography is not of interest.

Maynard, with whom the list begins, to use our author's own words, "stands conspicuous as a lawyer, a senator, and a politician,"



and certainly he seems to have been a sufficiently crafty politician. He was a practising Serjeant-at-Law in the time of Charles I.; he continued under the Commonwealth, being reappointed Serjeant by the Protector; he was created a King's Serjeant by Charles II.; he had a new patent as King's Serjeant on the accession of James II., and having been one of the five eminent lawyers summoned to their aid by Parliament in December, 1689, and given the eventful legal opinion that the King had abdicated, Parliament declared the throne vacant, and Serjeant Maynard reached the highest point of professional ambition, Keeper of the Great Seal.

In the names that follow we find many already familiar enough to our readers—Barnardiston, Bendloes, Callis, Carthew, Chancey, Davis, Finch, Fleetwood, Glanville, Hardres, Hawkins, Heywood, Kelyng, Moore, Plowden, Salkeld, Shepherd, Skinner, Tollens, Williams, and Wynne, with whose productions as authors or law reporters every lawyer is acquainted. Adair, Glyn, Trenchard, Whiteloch, Whitaker, who figure in history as politicians. Hill, who was remarkable as a sort of labyrinth of law, without the *gift of the gab*, and Wilkins, who had the latter quality in such abundance without the trammels of legal learning. In the sketch of the lives of these distinguished members of the brotherhood, Serjeant Woolrych has shown considerable judgment and good taste; whilst, unlike Lord Campbell, he has condescended to acknowledge, on all occasions, the sources from which he has derived his varied information.

A rule which the learned author laid down for himself, excludes from this book the names of those serjeants who attained judicial rank. We regret this, and cannot help thinking it is, in some degree, an error. It is perfectly intelligible that those judges who were raised to the rank of the coif, in accordance merely with the old law and custom of the land, should be excluded from a book devoted to the eminent Serjeants-at-Law of the English Bar; but why members of the order who had attained eminence as serjeants, and then become judges, should be excluded, we cannot understand. Serjeants' Inn has at all times contributed its fair share of the judges at Westminster Hall from among its ordinary members, and, notwithstanding the overwhelming influx into the ranks of the modern order of Queen's Counsel, and the discouragement afforded to the time-honoured rank of serjeant by taking away their old privileges, and discontinuing the old order of legitimate promotion at the Bar, there are on the Bench, and have always been, at least as large a number of judges distinguished at the Bar, as serjeants, as of those as *Queen's Counsel*.

This course adopted in Serjeant Woolrych's book excludes from it the names of many very distinguished Serjeants-at-Law. Why Best, Copley, Wilde, Talfourd, or Shee should be omitted from a book devoted to eminent Serjeants-at-Law we are wholly unable to see. Their fame was acquired long before they were raised to the judicial Bench, and though the glory of Serjeant Copley might be lost sight of in the renown of Lord Lyndhurst, yet Serjeant Best and Serjeant

Wilde were greater men when, as the acknowledged leaders of the Bar, they ruled the Court of Common Pleas, than, when as Lord Wynford and Lord Truro, they came in their turn to be Chief Justices. The genial and graceful Talfourd, orator, poet, dramatist; the high-minded and noble-hearted Shee, the most effective advocate of his day in or out of Westminster Hall, were so wholly identified with the order of eminent Serjeants at the Bar that they never sunk, in their after-acquired titles of Mr. Justice Talfourd and Mr. Justice Shee, those by which they were so much better known. Serjeant Talfourd and Serjeant Shee are names familiar as household words, whilst, outside Westminster Hall, few will remember "Mr. Justice Talfourd" and "Mr. Justice Shee."

We hope the learned author of the excellent work before us will, in a future edition, give the lives of these and others not now among the eminent Serjeants-at-Law.

The Commentaries of Gaius on the Roman Law, with an English Translation and Annotations. By Frederick Tomkins, Esq., M.A., D.C.L., and William George Lemon, Esq., LL.B., of Lincoln's Inn, Barristers-at-Law. Part II. Completing the work. London: Butterworths. 1869.

In a recent number we expressed our high opinion of the first part of this most useful and interesting work. The second part has been executed in the same thorough and satisfactory manner. A full and accurate index has been added.

Mr. Tomkins and Mr. Lemon have supplied a most important *desideratum*. It is essential that every student of Roman Law should know something of "the great institutional writer whose wisdom illuminated, not only the brilliant age of the Antonines, but, although long lost to human observation, exerted a permanent influence upon the jurisprudence of every succeeding age." We quote from a graceful dedication of the work to the present Lord Chancellor. No less valuable will the work be to the classical student, from the light which it throws on the legal allusions of the writers of the Augustan age set forth, when the system of law which prevailed very closely resembled that which is in the Commentaries of Gaius. The present work will be found to be equally interesting to the jurist and the scholar, and the thanks of both will be due to the gentlemen who have devoted much time and labour to the task which they have successfully accomplished. We have every reason to hope that their services in the elucidation of Roman jurisprudence will be fully recognised both in the Universities and in the Inns of Court.

Shelford's Law of Joint Stock Companies, containing a Digest of Case Law; the Companies' Acts, 1862, 1867, and other Acts relating to Joint Stock Companies; the Orders made under these Acts to Regulate Proceedings in the Court of Chancery, and

**County Courts; and Notes of all Cases Interpreting the above Acts and Orders.** Second Edition, much enlarged, and bringing the Statutes and Cases down to the date of publication. By **David Pitcairn, M.A.,** Fellow of Magdalen College, Oxford, and of Lincoln's Inn, Esq., Barrister-at-Law; and **Francis Law Latham, B.A.,** Oxon, of the Inner Temple, Barrister-at-Law, Author of "A Treatise on the Law of Window Lights." London: Butterworths. 1870.

THE present work will be found fully to realise what its title-page would lead its readers to expect. It is an elaborate digest of case law on the subject of Joint Stock Companies, and contains all the other information which is above indicated. Although nominally a second edition of Mr. Shelford's treatise, it is in reality an original work. Since the publication of the first edition, the whole of the law on the subject of Joint Stock Companies has been considerably modified by the decisions of the Courts. The law, especially with respect to questions arising on winding up, has been very extensively developed of recent years, and the Companies' Act, 1867, has amended the Act of 1862 in many important particulars. All this gives an entirely new character to the present work; but in addition to this, the form and arrangement adopted by Mr. Shelford have been changed, and, we think, greatly improved by Mr. Pitcairn.

The work is divided into two parts. The first consists of a digest of cases relating to the principles of Law and Equity as applicable to Joint Stock Companies, arranged as notes to general statements or propositions. These propositions have been prepared with much care, and afford admirable summaries of the law on all the matters to which they relate. With respect to the cases referred to, the aim has been to give a short and correct account of each in such a manner as to show its bearing on the general proposition which it is brought forward to illustrate.

The second part of the work consists of the Statutes and Orders of Court, with notes of all cases interpreting them. On this part of the work the same attention has been bestowed as on the previous, and every case bearing on any of the sections or rules has been carefully noted. A full and accurate index also adds to the value of the work, the merits of which we can have no doubt will be fully recognised by the profession.

**The Administration of India from 1859 to 1868. In Two Volumes.**

By **J. T. Prichard, Barrister-at-Law.** London: Macmillan and Co. 1869.

To those who are interested in the Government of India, that is to say, to those who are prepared to look beyond the merely insular politics of this kingdom to that which affects the whole empire, it is impossible that these volumes should not be interesting. They are

the record of our attempt to govern India in a new fashion. The first ten years of administration under the Crown might safely have been predicted to contain many errors and many tentative efforts which might well have to be abandoned, but the period is quite sufficiently long to give us some answers to questions which are of interest to all who have ever thought about our government of and our position in India. Has the ten years of new government produced a better feeling between Englishmen and natives? Has the native shown any signs that he is advancing in civilisation, that caste is beginning to go, that his religious superstitions are growing weaker, that he is becoming fitted for self-government, that he regards our countrymen with any other feeling than that of hatred as a conqueror and a tyrant? Is there any chance that we may be able to discipline the country so well, that in the course of years, Hindoos may not only take part in the government, but allow us to retire from it altogether, with the satisfaction that it will not relapse into disorder and barbarism? Is there any likelihood that as the Spaniards have made their language the common one from Panama to Cape Horn, so we may make English to be universally spoken from the Himalayas to Point de Galle? Should we, if we were expelled from or left India within the next ten years, leave any other signs of civilisation than broken bottles? Would our few railways, our canals, our public buildings be worthy of comparison with those left by Mahometan conquerors? Is India finally under English Government to break through the bondage of the past, to uncrystallise herself, or, to choose a more appropriate metaphor, to come to life again after her long hybernation and to begin again to grow? Is it possible that nations whose manners have been stereotyped for many centuries, so that down to the very cut and pattern of a dress shall be a thousand years' tradition, can begin to adapt themselves to the teachings of western civilisation? Or must India, roused temporarily only from her long sleep, again relapse into it, should England ever think it advisable or be compelled to abandon India? Such questions as these are continually being asked by those who take an interest in imperial politics, and one of the most important indirect advantages which England gains from her possession of India and of a colonial empire is that her statesmen are compelled to ask and to answer such questions. A Frenchman thinks that the conduct of every country in Europe is of supreme importance to France, if indeed his theory is not that every country in Europe ought to regulate its conduct in conformity to the wishes of France. But English politics have never had the slightest tendency, except perhaps during the last forty years of the eighteenth century, to become cosmopolitan. And it is therefore of considerable national advantage that our colonies and India should widen somewhat the range of English politics. In India, of course, the problems presented are different in kind from those offered to us by the colonies. The great problem of all is one which has never yet been satisfactorily solved. Given on one side a Christian nation in Europe, containing thirty millions, inhabiting a cold climate, unwilling to intermarry with those of different race,

having a tendency to treat all other races with something of contempt, a contempt which is increased when the inferior race is at once weak and dark-coloured, a nation possessed of great powers of organisation, whose ancestors have been accustomed to self-government from time immemorial, of great energy—a race apparently sufficiently prolific to continue sending relays of Englishmen to replace those who have worn out or died off; and on the other side, a country containing a hundred-and-fifty millions of people, comprising various nations differing as widely from each other as those of Europe, all unchristian but of different and hostile creeds; lastly, on one side a nation, young, active, and growing; on the other, races inactive and which have ceased to grow for centuries; given such conditions, how can one race be of benefit to the other? Can we pour in the new wine of our civilisation into their old bottles? That we are honestly endeavouring to solve this problem Mr. Prichard's book clearly shows us. That our efforts have been very far from successful is known to every one who knows anything of the condition of India; but that we are actually making the dead races show signs of life, are breaking down the caste of two thousand years, that without endeavouring to proselytise the people, we are undermining their old superstitions, are not the less true. If we succeed in quickening India we shall leave behind us greater monuments than all the conquerors who have preceded us put together, even though the buildings and the material works we may leave behind us may be far inferior to theirs.

The volumes before us show how difficult is the task we have undertaken in the government of India. Their author has had the opportunity of seeing India from two entirely different aspects: first as an official under government, and next as a dweller in India in a private capacity, and he tells us that a native, the best informed and best educated, would no more dream of disclosing to an officer of government his real ideas and opinions than he would of introducing him into his zenana. The Asiatic is always on his guard, always wary. His opinions are all suited to chime in with those of the official interrogator. To those who, like himself, have passed from a public to a private capacity,—the change is sudden and marked. It is as if you had worn colored spectacles half your life and they had been suddenly withdrawn. Mr. Prichard does not attempt to tell the story of the rebellion, but begins with the history immediately on its close. In connection with the history he gives us notices of social progress, of questions of finance, of education and of army amalgamation. Some of the information relating to army hygiene is particularly interesting. Mr. Campbell, a few days ago, spoke of the evils which had resulted from our contradictory systems of building barracks in India. The reader desirous of further information on this subject will find it in these volumes. Sir John Lawrence, we learn, believes "that a great deal of the unhealthiness among soldiers arises from their being unmarried." Perhaps no pages are more interesting than those which are devoted to the questions of education in India, and especially of the education

of women. At present the work seems to be languishing for want of female teachers. "Very recently," says Mr. Prichard, "an impetus has been given to it by Miss Carpenter's influence, and the intelligent, enterprising and philanthropic native gentry of Bombay have come forward to aid her with their purses and their co-operation in the most liberal and hearty manner."

Into the interesting question of Braminism—a question which may be regarded as having been brought forward as the result of our science-teaching in Hindoo schools and colleges—we cannot enter, and for a variety of other questions of great importance we must refer our readers to these volumes. Being the latest volumes on the great Indian problems, which we have alluded to at the beginning of this notice, they are on this account the best. But we are much mistaken if they are not widely read by our countrymen as faithful records, written by an able, thoughtful, and observant man, who has had unusually good opportunities of making himself acquainted with his subject of the first ten years' administration of India under the Crown.

Supplements to the Third Edition of Powell's Law of Evidence, containing the Alterations in the Law of Evidence, effected by the Evidence Further Amendment Act, 1869; the Documentary Evidence Act, 1868; the Bankruptcy Act, 1869; and the Habitual Criminals Act, 1869; together with the leading Cases on the Law of Evidence, decided since February, 1868. By John Cutler, B.A., of Lincoln's Inn, Barrister-at-Law, Professor of English Law and Jurisprudence, and Professor of Indian Jurisprudence at King's College, London; and Edmund Fuller Griffin, B.A., of Lincoln's Inn, Barrister-at-Law. London: Butterworths. 1870.

THE contents of this little work are indicated by its title. The first chapter treats of the "Evidence Further Amendment Act, 1869" (32 & 33 Vict., c. 68). It alludes to an open question, which may arise under the Act of 1869, whether the provisions in the second and third sections, as to the competence of witnesses to give evidence in certain cases where they were not so competent before the passing of the Act render such witnesses also *compellable*, as well as competent. We cannot agree with the opinion of the writers, that such witnesses are compellable as well as competent. In the second section of the Statute 14 & 15 Vict. c. 99, the words are "competent and compellable" which would imply that a witness may be competent, though not compellable, to give evidence. The force of this reasoning the writers themselves admit. We may add, further, that a witness is occasionally exempt from the obligation of giving evidence, where his evidence, if given, would be admissible; as, for instance, he may, if he likes, answer questions tending to criminate himself, though he is not compellable to do so.

The phraseology of the Act of 1869 is, in one respect, somewhat singular. By the second section, "the parties to any action for breach of promise of marriage shall be competent to give evidence in such action." By the third section, "the parties to any proceeding instituted in consequence of adultery, *and the husbands and wives of such parties*, shall be competent to give evidence in such proceeding." Is it to be held, then, that, in cases arising under the second section, the incapacity of husbands and wives of the parties to give evidence is to continue, or are the words removing their incapacity in cases arising under the third section to be rejected as surplusage?

With regard to the fourth section, the writers point out that it would not apply to the case of affidavits, which would continue to be governed by the old law.

The second chapter treats of "Other Statutory Alterations," that is, the remaining statutory alterations mentioned in the title, including the very serious alterations in the law made by the ninth and eleventh sections of the Habitual Criminals Act. The remaining portions of the book consists of notes of last year's decisions bearing upon the subject, followed by an Appendix containing the statutory provisions treated of in chapters I. and II., which are given *in extenso*.

**A Handy Book on Property Law, in a Series of Letters.** By Lord St. Leonards. 8th edition, enlarged. William Blackwood & Sons, Edinburgh and London. 1869.

THIS admirable little work still appears to maintain its deserved reputation. Though professing to be addressed to a man of property, it may be very usefully read and re-read by the lawyer, to remind him, not only of the latest statutes, but of many other things which he may overlook in larger works. The author's life-long familiarity with the subjects treated of enable him also to give many valuable practical hints, not to be met with elsewhere. Not the least merit of the book is that it is both clear, compendious, and short.

**A Manual of the Law and Practice of Bankruptcy, as amended and consolidated by the Statutes of 1869, with an Appendix, containing the Statutes, Orders, and Forms.** By John F. Bulley, B.A., of the Inner Temple, Esq., Barrister-at-Law, and John William Willis Bund, M.A., LL.B. London: Butterworths. 1870.

IT is certain that the public will be, if they are not already, flooded with the manuals or books of practice, that the Press, fed by the industry of aspiring members of the Bar, will bring forth on the important subject of Bankruptcy. The Bar has long held almost the monopoly of legal authorship, and the *cacoethes scribendi* is very strongly developed among the junior Bar. Emulous of the fame of a J. W. Smith, a Sugden, or a Williams, our authors are members of

that hopeful band, and their names are as yet, we believe, unknown to fame. They have, therefore, we venture to think, done wisely and well in their laudable effort to show what stuff they are made of, for the book shows that care and labour have not been spared.

In the preface to this work the writers inform us that theirs is an "attempt to place before the profession and the public an outline of the New Law of Bankruptcy, and to provide rather a practical manual than a theoretical treatise upon so difficult a subject." We think, after an examination of this work, that the authors have carried out their plan with great credit to themselves, and we hope to the advantage of those who may have to put the book to a practical use. We are not in a position to compare the present work with its rival productions. But, whatever the merits of other works may be, we can, we think, commend Messrs. Bulley and Bund in their effort to make their work complete. The introductory chapter is very well done. It contains a brief account of the history of our Law of Bankruptcy, and a chapter such as this is, in our opinion, the proper method in which to commence such a book, while to the student such an introduction is invaluable.

It would be impossible, within our limits, to place before our readers any worthy *resumé* of this complete manual; but we may briefly state that, passing from the introductory chapter, we find the subjects, "Liability to the Bankrupt Law," with sub-sections, (1.) who may be bankrupt; (2.) who are traders; and the "Acts of Bankruptcy," with sub-sections, (1.) Acts common to traders; (2.) Acts relating to traders only, admirably dealt with, with more than average clearness and conciseness. Excellent as the main portion of the work is, we must also say a word in praise even of such "paste and scissors" work as the Appendix. This is as complete as possible; it contains, we may say with absolute truth, everything that can be wanted by the practitioner, be he barrister or attorney, namely, the statutes, the rules and orders, including the County Court rules under the Debtors' Act of 1869, and the forms, with tables of fees and costs.

The essential merit of the work is completeness, and we think we may assure our authors, that work so well done must meet its reward.

A Manual of Bankruptcy and Imprisonment for Debt, under the Bankruptcy and Debtors Acts, 1869; an Epitome of the Law under these Statutes, with a Comparative Table, showing the changes made by the new Act. By G. Manley Wetherfield, Solicitor, author of "A Treatise on Composition Deeds," &c. London: Longmans & Co. 1870.

THIS is an excellent manual of the new Bankruptcy Law, and will be found very useful both by the legal profession and the mercantile community. It contains a clear and succinct statement of the provisions contained in the Bankruptcy and Debtors Acts of 1869,



and points out accurately the changes in the law which they have effected. To each chapter, into which the matter is divided, the sections of the Acts relating to it are added; those that are of greater importance being given at full length, and those that are of minor importance in a condensed form. Mr. Wetherfield has treated the subject in a thoroughly practical manner, and has given many suggestions which will be likely to prove useful to those who have to take proceedings under the new Acts. The work has obviously been prepared with much care, and may be safely recommended as a trustworthy guide to the new Acts.

Digest of and Index to the Bankruptcy Act, 1869, The Debtors Act, 1869, and the Bankruptcy Repeal and Insolvent Act, 1869. By John Linklater, Solicitor. London: Butterworths. 1870.

It has been well said, that now-a-days a knowledge of the law is not so requisite as a knowledge of the places where you can find the law. We hope we are not libellous when we say that Mr. Linklater's name and bankruptcy are synonymous.

No one knows the subject better; and this thin paper volume will be found a most useful guide to the provisions of the Bankruptcy Statutes of that "*annus mirabilis*," 1869.

The County Court Acts, 1867, with the authorized Rules, Orders, and Forms.—The Admiralty Jurisdiction Acts, 1868-1869, with General Orders and Forms, and full Table of Court Fees and Costs. By G. Manley Wetherfield, Solicitor. 2nd Edition. London: Longmans. 1870.

MR. WETHERFIELD is one of a class, now daily increasing, who recognizes the fact that whatever may have been the past of the County Court system, the future of that system is clear. The legislation of the last few years shows that the public are gaining confidence in the inferior tribunals, and that sooner or later the status of those tribunals will be greatly altered. Already those courts are thronged with suitors; and the profession in both its branches must accommodate itself to the needs of its employers, the public.

The volume before us makes no pretension whatever to the character of a learned or elaborate treatise. It is simply a book of practice, and is, so far as it goes, as complete as possible. Further, it possesses one advantage that shows Mr. Wetherfield is eminently a practical man, and that is, that the size of the book allows of its being carried in the pocket. At the commencement of the work, pp. 7-16 inclusive, there are some excellent "practice notes"; with these we have but one fault to find, and that is, under the head of "costs" we do not see any mention of the recent cases

decided and now reported upon the 5th section of the Act of 1867. With this exception, and it may be that the author has some reason for this omission, we can find no fault with the book, and so well do we think of this little manual, that we shall put it into use practically, and trust to its guidance as soon as an opportunity presents itself. At the present time the literature of the County Court is considerable. The bulk is large, and, upon the whole, the quality high. Messrs. Davis, Short and Jones, Pollock and Nichol, have done good service with their elaborate works. Mr. Wetherfield's book cannot compete nor does it pretend to do so with these. But as a handybook of practice, under the particular Acts, in completeness and in utility we have not heard of any competitor, and we certainly do not know of any rival.

**The Law of Railways:** embracing Corporations, Eminent Domain, Contracts, Common Carriers of Goods and Passengers, Constitutional Law, Investments, Telegraph Companies, &c., &c. By Isaac F. Redfield, Chief Justice of Vermont. Fourth Edition, greatly enlarged. In Two Vols. Boston: Little, Brown & Co. 1869.

THE task which the Chief Justice of Vermont set himself to perform some fourteen years ago, was one of no little difficulty and labour. Adopting a different plan from that pursued by Mr. Shelford in his work on the same subject, Chief Justice Redfield threw his treatise into the form of a digest. The scope of his work rendered this necessary; for he was about to deal with the law both of England and the United States, whilst Mr. Shelford, dealing only with that of England, which is mainly statutory, was able to adopt, without inconvenience, the method of giving the statutes as his text, and the cases on those statutes in the form of notes. As a digest, the work has already fully vindicated the high encomium passed upon it by the present Chief Justice of England, when, after expressing his "admiration for the great learning, research, and power of reasoning" displayed in it, he added his conviction that it "must prove a standard work on the subject of which it treats, and a very valuable addition to the juridical literature common to our two countries." The present edition has been much enlarged, so as to embrace the entire range of the law of common carriers of goods and passengers, and telegraphs. Some matter contained in the third edition, which was not entirely in harmony with the plan of the work, is omitted, but we are glad to find that it is to be published in a separate volume of leading cases and opinions upon the law of railways. What is left, however, forms an exhaustive treatise, which presents, within a reasonable compass and in a properly digested form, the whole law on the subject of railways, both English and American. It is this survey of the law of both countries which gives it a peculiar value, and has made it an often-quoted authority in our courts wherever a

case involving any new principle has been under discussion. The chapter (xxvii) which treats of the duties of common carriers brings together all the decisions in our own and in the American courts, on the nice questions it involves, with the single exception of *Redhead v. The Midland Railway Company*. That case was *sub judice* at the time when this edition was passing through the press; and, as the recent decision in the Exchequer Chambers\* must, we suppose, be taken as final, it is as well it should be noticed here. So far as our courts are concerned, it establishes the distinction between the liability of the carrier of goods and the carrier of passengers, that the former insures the safe delivery of the goods, whilst the latter only comes under the obligation to take due care (including in that term the use of skill and foresight) to carry the passenger safely. The result of this decision is, that the contract of a railway company with its passengers does not imply any warranty that the carriages in which they travel shall be in all respects road-worthy. There can be little doubt that, as Mr. Justice Montague Smith says, in delivering the judgment of the court above, the contention in favour of such a warranty, "so far as it rests on authority, falls in precedent" in the decisions of our own courts. But we venture, with great deference, to demur to his proposition that "it would not have been competent for the judges in the present day to have imported such a liability into such contracts on reasons of supposed convenience." Such an extension of a rule of law by judicial legislation is certainly not desirable if it can be avoided, but our reports are full of cases in which it has been more or less done, and done with advantage. We are much disposed to think that this is a case in which such an extension would be beneficial; that with certain statutory restrictions as to the amount of damage which could be recovered, it would be desirable to extend the rule, so as to make the contract between the company and its passengers an absolute insurance of the safety of their passengers, except so far as accidents are caused by contributory negligence of the passengers themselves. Such a rule will, no doubt, at first sight, to use the words of the American judge (Gould, J.), who laid it down in the American courts, seem a hard rule, but we concur with him in thinking that "it is the best that can be laid down, since it is plain and easy of application, and when once established is distinct notice to all parties of their duties and liabilities."† This view, one of the most able and learned judges we now have on the Bench (Mr. Justice Blackburn) strongly enforced in the dissenting judgment which he gave in the court below. And we feel sure that if its harshness were qualified by some well-considered statutory limitations of the amount of liability, the railway companies would gladly accept it; for it would put an end to the costly litigations involved in the issue of negligence or no negligence, and would reduce every railway accident to a question of the assessment of damages within defined limits.

\* Law Rep., 2 Q.B. 412; Ib. S.C. 4, 379.

† *Alden v. New York Central Railway Company*, 12, Smith, 104.

Essays upon the Form of the Law. By J. E. Holland, M.A.

London: Butterworths. 1870.

THESE are a series of essays contributed to various periodicals and societies, and including a specimen digest of the law of servitudes. The writer maintains that the question of the *form* of the law is now a more pressing necessity than the improvement of the matter of which it consists. It will not be necessary to assent to this proposition while admitting that the time has come when that form must be amended. Law amendment may well include improvement in the matter as well as in form. We quite agree that formal amendment may be conducted independently of material changes: that, in order to obtain a code, we should first endeavour to obtain a digest; that great care should be taken to map out a really scientific scheme, and that the obtaining a code should be the crowning of the edifice. An ideal code should embrace the whole body of the law. It therefore necessarily supposes the consolidation of our Common Law, including, of course, that portion of our law which is administered by the Courts of Equity, of our Statute Law, and the fusing of the two into one great scientific system. The first point to decide is, what should be the system of classification, or the main outlines of such a code? When this is settled, we may then take care that all our intermediate preliminary work should be in harmony with the final scheme. The subject is inviting, and to do anything like justice, either to it or to Mr. Holland's book, would require more space than we can at present supply. Before returning to it, however, we can confidently recommend these essays to our readers, as containing the results of considerable research of much careful examination into the subject, and of clear thinking.

Mr. Reverdy Johnson: The Alabama Negotiations, and their just Repudiation by the Senate of the United States. By George Bemis. New York: Baker & Godwin. 1869.

THIS pamphlet, which appears to be written from Paris, is a somewhat tedious *resumé* of the Alabama negotiations, from an American point of view. We are bound to say that the tone of the pamphlet is not unfriendly towards this country, though the extreme claims put forth in it on behalf of the United States, and which are implied in its title, would be indignantly repudiated by ninety-nine Englishmen out of a hundred. The object of the pamphlet appears from its opening paragraphs:—

“The extraordinary avowal of Mr. Reverdy Johnson, in vindication of his rejected ‘Alabama’ convention, that the United States obtained, by the convention in question, all that we have ever asked, an avowal contained in a despatch to Mr. Secretary Seward, on the 17th of February last, but which has but recently found its way into circulation on this side of the water, is one so calculated to embarrass the country in its further negotiations with England, and to disparage American reputation abroad for fair dealing in

diplomacy, that I feel called upon, as an advocate of American rights and American honour, to expose its groundlessness, and to uphold the perfect fairness and propriety of the Senate's repudiating alike Mr. Johnson's words and his works.

"It is bad enough to have such a compromising assertion as this, of the late Minister to England, caught up and echoed by our English opponents and European ill-wishers generally; but to have it started by our own diplomatic representative, in the first instance, and that out of apparent pique, because the country had not approved of his doings, constitutes an offence against official propriety and national loyalty such as, I believe, has never before been witnessed in an American Minister. I trust that the *exposé* which I am about to attempt, of the injustice of Mr. Johnson's extraordinary avowal, will be so conclusive that the most charitable deduction to be made in his favour, after reading it, will be that either his mind and memory had failed him, or that his ignorance of the subject which he was treating may have left room for his honestly believing in the truth of what he was so rashly and unwarrantably asserting."

The pamphlet, which consists of 36 pages, is an attack rather upon Mr. Johnson than upon Great Britain. It does not enter much into the intrinsic merits of the question between Great Britain and the United States.

The Law Examination Journal, and Law Student's Magazine, Michaelmas Term, 1869. London: Butterworths. 1869.

THIS periodical, which seems to be practically a continuation of the *Law Examination Reporter* but on a somewhat different plan, appeared for the first time in Michaelmas Term last. The first number contains—(1.) An Essay on the Merits and Defects of County Courts as Local Tribunals, by Mr. M. S. Mosely, the Editor; (2.) A Digest of such New Decisions as appear to effect alterations in the *Principles* of the Law; (3.) An Analysis of the more important Practical Statutes of the Session of 1869; (4.) Intermediate Examination Questions and Answers; (5.) Final Examination Questions and Answers; (6.) Notes on the Examinations; (7.) Correspondence.

The Editor seems to consider the Married Women's Property Bill and Mr. Locke King's Bill as "revolutionary measures," the failure of which to pass into law has left the session almost barren of results, excepting the Bankruptcy and Debtors Acts, 32 & 33 Vict. c. 71, and 32 & 33 Vict. c. 62. The absurd distinction between "specialty" and "simple contract" creditors is (happily as we think) abolished by 32 & 33 Vict. c. 46.

In "Notes on the Examinations," the opinion is expressed that the Common Law and Conveyancing papers of the final examination of Michaelmas Term err on the side of leniency, but that the Equity paper is more difficult than its companion papers. This (the writer of the "Notes" thinks) entitles the examiner to the thanks of all those who have the real education of law students at heart, "inasmuch as he has not followed the too-common method of asking a number of practice questions, based on the Chancery time-table, and

which call alike for the memory and the intelligence of a poll-parrot to answer correctly."

We venture to dissent very strongly from the opinion here expressed, and to pronounce the Equity paper a thoroughly bad paper. The writer of the "Notes" admits that question 53 is "by no means easy of solution." We should think not. Here it is:—"A female infant possessed of reversionary personalty is about to be married, and a settlement of such personalty in contemplation of the proposed marriage is desired; can and will a Court of Equity aid in effecting a valid settlement? And what constitutes the peculiarity of the case?" Answer (as given in p. 39 of the *Law Examination Journal*)—"The Court, it seems, cannot order a settlement to be made out of the reversionary property of a *married woman*; in other words, cannot enforce the wife's Equity to a settlement out of her reversionary personalty. (*Vide Taylor v. Austin*, 1 Drew, 459, *et seq.*; and see also 20 & 21 Vict. c. 57.) There appears to be no reason to doubt the power of the parties themselves, if *sui juris*, to agree to a settlement of an *intended* wife's reversionary personalty, taking care, of course, to constitute trustees with power to do all that is necessary to possess themselves of the reversionary property when it falls into possession. But it appears difficult, at first sight, to perceive in what way the Court could interfere in the instance given by the examiners, inasmuch as an infant would have no power to make such a settlement, except under the somewhat limited provisions of 18 & 19 Vict. c. 43. In a case falling within this statute, however (the intended wife not being under seventeen), the Court might be asked to give its sanction to the settlement, and there seems no sufficient reason to think that such a settlement of reversionary personalty would not be valid."

The first part of this answer is mere beating about the bush. There is nothing in the question about the reversionary property of a woman actually married, or about a wife's equity to a settlement, but the question has reference to a settlement in contemplation of marriage. With regard to the scope of the statute 18 & 19 Vict. c. 43, it will be remembered that its operation is confined to those cases where the intended husband is at least twenty years of age, and the intended wife at least seventeen. The gentleman who has undertaken to answer this question for the *Legal Inquirer* says, with sufficient boldness and common sense, "I do not see the peculiarity of the case." The *Law Examination Journal* does not make this avowal, though it fails to explain what it is that constitutes the peculiarity of the case.

The fact is, the question is utterly nonsensical and unintelligible. And doubtless, if it be the object of an examination paper to "floor" the candidates, there would be a good deal to be said for the papers which are frequently set in legal examinations. But one result of such papers is, that candidates, who are thoroughly well up in their subject, are utterly at a loss to know how to answer the questions given. So far, therefore, from the paper "satisfactorily testing the knowledge of the students," it utterly fails to do so. With regard to

the particular question before us, we have submitted it to barristers of practice and standing in their profession, but they have been utterly unable to conceive what the question can have meant. Nothing can be more absurd than to suppose that a hard paper proves the competence of the examiners. To our mind it proves just the reverse. A fool may suggest a question which an Eldon or a St. Leonards may be unable to answer. Nor does the hardness of the questions necessarily imply severity in the examination. It just as often implies the reverse. The questions may be so hard that nobody can be reasonably expected to answer them. Then examiners are seized with a fit of leniency, and let through many who ought not to be allowed to pass. As for the danger of a young man getting up his subjects like a poll-parrot, the notion is ridiculous. We certainly do not believe in the being who can get up Williams, Hunter, Haynes, White, and Tudor (not to mention a host of other books) by rote, without understanding a word of them; and unless the repetition were absolutely perfect, the candidate would certainly betray himself in his answers. And even if the feat were possible, nothing would be easier for the purpose of testing the understanding of the candidates, than to give questions involving simple applications of the principles of the subject by way of example. There is no need for this purpose to set difficult or unintelligible questions, and there is not the slightest excuse for doing so.

We may remark further on the equity paper, that Question 46 is in these words—"Equity forbids parties standing in certain relations from becoming . . . purchasers of property in respect of which those relations exist. Mention some of these relations. . . . *And how would you get a case deserving such exception, excepted from the operation of the general rule?*" What can possibly be the meaning of the words we have given in italics?

Marshalling of assets and marshalling of securities are different branches of the same subject, and in fact mean precisely the same thing, the first phrase being used with respect to the estate of a deceased person, the second with respect to the estate of a living man. Yet these two phrases form the subject of two distinct questions—49 and 51 respectively.

We have thought it necessary to say thus much, for the practice of setting hard and long examination papers is a growing evil, and calls for the strongest remonstrance. Let the questions be as simple and intelligible as possible, and taken exclusively from the books appointed for the study of the candidates; and, this done, let the examiners see that they are correctly and intelligently answered.

The Amalgamations of the Two Branches of the Legal Profession Considered, with a Special Reference to Contemplated Law Reforms. By C. T. Saunders, Attorney-at-Law. London: Butterworths. 1870.

A ~~VERY~~ able pamphlet, although somewhat too enthusiastic in tone.

Mr. Saunders has evidently taken a deep interest in this question, and has very ably argued for the amalgamation.

We are by no means hostile to the views of those who advocate amalgamation, and have ourselves, in a very lengthy paper upon the scheme of Mr. Jevons, brought forward what appears to us to be some of the difficulties in the way. We mean the practical difficulties, for we are clearly of opinion that, while this great difference in caste which at present exists between the two branches is altogether wrong, there ever will be some difference between those who work, like the mole in the dark, and those whose names are known to the public as advocates.

We recommend our readers to peruse Mr. Saunders' pamphlet, with which, although we have fault to find, we, in the main, so much agree, that it is but due to the writer to say that he has most ably stated his case.

On the Liquidation of an Insolvent Life Office. By C. J. Bunyon, M.A., Barrister-at-Law, author of "The Law of Life Assurances," &c. London: Layton. 1870.

MR. BUNYON'S thorough knowledge of the subject of Life Assurance renders this pamphlet of great interest. He submits "that to wind-up an insolvent life office on the principle of a rateable reduction of claims and by the application of the common fund according to the tenor of the respective policies of insurance, is the only just mode of proceeding, and that which is required by the necessities of the case, by the rights of all parties, and by the broad principles of equity underlying the nature of the institution itself." The manner in which this principle might be worked out to the advantage of all is explained by the author in a very clear and able manner.

The Law in reference to Suicide and Intemperance in Life Insurance—read before the New York Medico-Legal Society, by William Shradley, LL.B., Counsellor-at-Law. New York. 1869.

THIS paper contains a review of the leading English and American authorities on the branch of law of which it treats. From this review the following points are established:—

"1. The English decisions strictly construe the words 'die by his own hands or the hands of justice,' or the words 'commit suicide,' as extending to all voluntary acts whether the party committing such acts was sane or insane. 2. The American cases, with few exceptions, construe the same words as meaning only criminal acts of self-destruction, and do not extend to acts not under the control of the will. 3. That it is the business of the insurers to obtain, by general or specific questions, a full statement of the habits and constitution of the insured, and when these have been answered in good faith by the insured, the policy will be held good."



**The Valuation (Metropolis) Act, 1869, with Introduction, Notes, and Index.** By Dolby P. Fry, Esq., Barrister-at-Law, and of the Poor Law Board. London: Knight & Co., 90, Fleet Street. 1869.

THE want of one uniform assessment for rateable property of the kingdom has long been felt, and the difficulty in knowing on what system a union or parish is assessed has always been one of anomaly, injustice, and inequality until the present Act was passed. This Act, however, applies only to the metropolis, and it is much to be regretted that another Act of wider scope embracing purposes of government and local taxation, was not provided for the whole rateable property of the country. An extension of the principles of this Act, if found to work well in the metropolis, must sooner or later be applied throughout the whole country, giving one uniform tax for county rate, police rate, and for other local or imperial taxation that may be needful. This little work not only includes the above-mentioned Act, with its copious notes and references, but three other short Acts, regulating parochial union assessment. In this special department of Poor Law literature the intimate knowledge and practice of the editor of this work stands pre-eminent, and those who are engaged in Poor Law administration will find a great saving of time in studying what would otherwise appear a very perplexing branch of their professional duty.

**The Law to Regulate the Sale of Poisons within Great Britain.** By William Flux, Solicitor to the Pharmaceutical Society. London: J. Churchill & Sons. 1869.

THE sale of poisons is regulated by two Statutes: the Arsenic Act, 14 Vict. c. 13, and the Pharmacy Act, of 1868, 31 & 32 Vict. c. 121, but a third Statute, 26 & 27 Vict. 113, prohibits the sale of poisoned grain or seed.

This little work places before the reader all that is important relating to the two first Statutes, and whatever concerns the regulations and qualifications of Pharmaceutical Chemists. Persons now keeping open shops for retailing, dispensing, and compounding of poisons, must submit to certain formalities expedient for public safety. The registration of chemists and druggists, examinations under the Pharmacy Act, penalties for false representation, form of schedule for sales of arsenic and for other poisons will be found in detail, with much useful information given by a writer practically conversant with the subject.

**Shakespeare Illustrated by the Lex Scripta.** By William Lowes Rushton, Barrister-at-Law. First Part. Longmans & Co. 1870.

THE above is the first part of a collection of illustrations, some of which the author tells us were originally contributed to the Berlin Society for the Study of Modern Languages, of the assumption by Shakespeare of terms then in vogue, mostly in the contemporaneous written law of his period.

The similarity of some of the passages quoted by way of com-

parison with the Statute Law would require very little research or depth of knowledge to discover, even were it by an unprofessional. Take, for instance, the first cited passage from the Duke of Suffolk's charge to Cardinal Wolsey, in Henry VIII.

"To forfeit all your goods, lands, tenements,  
Chattels, and whatsoever, and to be  
Out of the king's protection."

The phraseology here is unmistakeably legal, and history tells us that, under a writ of *præmunire*, originally framed to operate against popish usurpation, these conditions could be imposed. But further on we come to an ambiguity less easy of elucidation. Shakespeare, it would appear to our author, seemed to delight in playing on the word "fustian," and to ridicule the idea of it. This is accounted for by the penalties imposed by the Act of 11 Henry VII., c. 27, for dressing fustians, an article of cloth much in use at that period, among "common people and serving men," after importation. These restrictions were subsequently further enforced by 39 Eliz. c. 13, when Shakespeare was in his prime. Whatever opinion our bard might personally have entertained of the principle of that enactment, he seems to have indulged a good deal in ridicule of it. But exceptions may, we think, be fairly taken to the construction in one or two instances suggested, and put upon words derived from that of "fustian." We have the word itself, and in various forms, the relative positions to it, as "fustilarian, fust, fusty, and mouldy," the latter suggested to be synonymous with "fusty." They are all suggested to have their derivation from "fustian." But was not the word "foistey" corrupted into "fusty" before Shakespeare's time? If so, why is the application of it directed to fustian, when its literal meaning may be applied with equal force, although spoken in the slang of Falstaff. Walker quotes, as Shakespeare's signification of "fustilarian" to be "a fusty fellow," and Mr. Rushton would have that fusty fellow to relate to fustian; but would not the word equally apply to "fuz or fust," as given by Wharton, "a wood or forest," i.e., a woodman or forester? We point this out from among others which may be considered far-fetched.

With slight variation from set legal phrases, Mr. Rushton has laboured hard to work out the meaning of many ambiguous passages, and in most instances we must give him credit for having succeeded to our satisfaction. Taking the little volume before us in its entirety, the least we can say of it is, that it is a very interesting and plausible attempt to throw light upon obscure passages in the works of our immortal bard, a study which Mr. Rushton has peculiarly devoted himself to.

Die Todesstrafe, in ihrer Kulturgeschichtlichen Entwicklung.

Eine studie von H. Hetzel. Death Punishment, Studied in Relation to its Historical Development. By H. Hetzel. Berlin : 1870.

THE Penal Code, both in past and present times, has its political,

theological, philosophical, and even its medical aspects. The punishment of death in all countries and in all ages, with many curious details of contemporary opinions that held sway, are here minutely described. The first few chapters of the work are occupied with an account of practice and customs for carrying out capital punishment amongst the Egyptians, Persians, Chinese, and Hindoos; in Greece and Rome, and in early Christian ages; during the Mahommedan era and up to the Reformation. The latter two-thirds of the work are, however, more interesting to the student of modern history. Voluminous quotations from every author who has either discussed or written upon the subject, both in Europe and America, comprehend all that has been said by adherents and opponents of the system. The work is a valuable addition to the literature of jurisprudence generally, and to that of criminal law in particular, as it relates to capital punishment.

**Failure of Sight from Railway and other Injuries of the Spine and Head, its Nature and Treatment.** By Thomas Wharton Jones, F.R.S., F.R.C.S., &c. Professor of Ophthalmic Medicine and Surgery, at University College, &c. James Walton, Gower Street. 1869.

THERE are certain medico-legal aspects of questions relative to cases of railway injuries which this work was originally undertaken to elucidate; for owing to the numerous and complicated trials instituted for the purpose of recovering compensation from railway companies for injuries by collisions and accidents, a few special works have appeared on the subject, amongst which the present is one of the best.

The failure of sight, which often comes on after the concussion of the spinal cord and brain, appears to depend on a disturbance of the circulation of the blood in the optic nervous apparatus, but how this comes about is not so easily answered. The author has instituted laborious physiological and pathological experiments and observations, calculated to lead to the solution and settlement of different opinions. This work claims from every medical man the most careful study, on account of fundamental principles which it illustrates in the departments of medicine and surgery, but the cases and inferences are such as are well adapted for the guidance of those engaged in legal inquiries, and throughout the work the medico-legal bearings of the subject are constantly kept in view.

There is an additional chapter at the end of the work devoted to the examination of points relating to the process of inflammation, which it perhaps was considered out of place to have entered upon in the work itself; it is distinguished for its remarkable exposition of one of the most common but difficult questions for investigation, and stamps the author as one of the highest physiologists of the present day.

**A System of Shorthand.** By Thomas Gurney. 17th Edition.  
London : Butterworths, Fleet Street. 1870.

ONE would not expect a system of shorthand to be recommended by antiquity ; and the 17th edition of a system first brought into public use in 1738 is a literary curiosity. However, it may compare with modern systems. Gurney's has done the State some service, and continues to do so ; fostered on the one hand by a species of protection, and on the other by traditional prestige. It is scarcely possible for one man to attain such proficiency in two systems as to pronounce upon their comparative merits. It is difficult to apply any conclusive test with two or more persons ; and there are very few who feel confidence in answering a question often asked—Which is the best system of shorthand ? We believe that the present Mr. Gurney, who still retains the privilege of finding shorthand writers for Parliamentary Committees, enforces, as far as possible, the use of the family system, and to any wishing to join his staff this book might be useful. But the system is very little used for press work, and indeed the majority of those who report parliamentary debates and public meetings use a modern system, which has this commendation, that it is developed from first principles and forms as the telescope is elongated by self-contained tubes.

**Reeves' History of the English Law, from the time of the Romans to the end of the reign of Elizabeth.** A new edition, in Three Volumes, with numerous Notes, and an Introductory Dissertation on the Nature and Use of Legal History, the Rise and Progress of our Laws, and the Influence of the Roman Law in the formation of our own. By W. F. Finlason, Esq., Barrister-at-Law. Vol. III. From the reign of Edward IV. to the reign of Elizabeth. London: Reeves & Turner. 1869.

THE present volume brings to a conclusion the labours of Mr. Finlason as editor of Reeves' History of English Law. Of the learning and ability which he has shown in the execution of the task assumed by him, there can be only one opinion. He has thrown light on many dark places of our Jurisprudence, explained much which Reeves and other writers had failed to understand, and traced with admirable skill the development of the great principles of the Common Law of England. Such labours as these of Mr. Finlason cannot fail to have an effect on the study of the history of our legal system. He has dissipated, in the most satisfactory manner, many conventional notions which have long prevailed ; and, if in any case he has failed entirely to substantiate the views he has brought forward, he has never failed to be suggestive and instructive. At present we are compelled to confine ourselves to a mere notice of the last volume. In point of interest, the period embraced ranks before those which preceded it. It records the gradual decadence of

the feudal system, and the substitution of our modern jurisprudence in its essential features. Mr. Finlason, in his elaborate notes, has happily illustrated the nature and character of this great transition. He is equally at home in all the branches of our law, and is able to survey the whole field of our jurisprudence. We can now only thank him for the interesting views which he has presented to us, and express our unhesitating opinion of the value of the labour which he has bestowed on the elucidation of the History of English Law.

---

## **Events of the Quarter, &c.**

---

### CHAIR OF HINDU, MOHAMMEDAN, AND INDIAN LAW.

THE increase of students-at-law from India, and of Europeans intending to practice at the Bar there, has been so great that the Benchers of the several Inns of Court have thought it necessary and expedient to found in the Legal University a chair of Hindu and Mahomedan law, and the laws in force in British India, with a view of removing the opprobrium that has so long attached to our government of India, not only amongst natives, but Europeans, in consequence of our neglect to teach the laws to those who are destined to engage in their administration, either as practitioners or judicial officers; and the appointment of a Reader in those laws to the Inns of Court having fallen upon the Council of Legal Education, that learned body selected, with the entire approval of the Inns of Court, Mr. Standish Grove Grady, whose works on the Hindu and Mahomedan laws have been reviewed in this magazine. The learned Reader delivered his first lecture in the Middle Temple Hall, on Saturday, the 13th of November last, in the presence of a large and distinguished audience, including representatives of the Benchers, and leading members of the Bar.

After a graceful allusion to the liberality of the Benchers, in founding the new chair of law, and referring to the inducements which actuated them in doing so, he pointed out the advantages that must result therefrom, not only to the Indian community, in consequence of having well-trained lawyers practising in their courts, but to those lawyers themselves, as well Native as European, and also to those destined to discharge judicial functions in India. The importance of the subjects which will form the present course of lectures, the Reader said, was evidenced by the great extent of the territories of India, and by the vast population scattered over them. The former comprising 1,287,483 square miles, the latter from 140 to 170 millions of inhabitants, who, if not the first, were at least one of the earliest civilized nations of the world. Although the Hindus are destitute of any historical account of their ancestors; with regard to their laws, manners, customs, and religion, we are supplied with ample information. The first code of Hindu laws of which we have any knowledge was framed and propounded by Menu.

From it we may form some idea of the state of society and civilization which at an early period (1280 years before Christ) they had attained; from that work as well as from the Vedas, supposed to have been prepared 500 years earlier, we can form some idea of their attainments at that time in science, philosophy, and religion. To go back to the period of the human family, when it might be said that they lived under no rules, or regulations for their conduct, no laws, would take us into a wide field of speculation that would far exceed the limits of a lecture. The prevailing opinion seems to be that all law originated in the family relation, eventuating itself in custom, which subsequently became embodied to a great extent in positive written law. All laws must derive the permanent features of their character from the peculiar manners, customs, and languages of the people amongst whom they originated. The attempt to study the laws of British India has been heretofore met at the threshold by the want of elementary works. The laws themselves are so diverse and complicated in their nature, and are scattered about in such a multitude of volumes, that in the absence of elementary works a long course of laborious investigation and patient study becomes requisite before the student can see his way through a mass of legislation, which must appear at the outset an impenetrable chaos. There has hitherto been no assistance given for the oral and scriptory teaching of the laws of India, and, were it not for the system of progressive advancement which this state of things compelled the East India Company to adopt, and the Government of India to continue, with regard to those destined to discharge judicial functions there, this neglect would have been long since productive of consequences totally subversive of justice, and most disastrous to our best interests in that country. This system of progressive advancement has, it is true, by affording time for the gradual acquirement of the laws, by study on the spot, and for the acquisition of knowledge by actual experience, supplied to some extent (but at great cost and vexation to suitors, in consequence of the series of appeals which it inaugurated) the absence of facilities for preliminary study. But it must not be concluded that such facilities were unnecessary, or that we can with safety postpone the study of the native laws until we arrive in the country and actually enter upon their administration. It is a fatal error to postpone the acquisition of the science of law until the hour of its practice has arrived. This was the error into which the East India Company fell. Instead of holding out inducements to the profession for the publication of elementary works for the study of the law, and appointing professors to teach it to those intended to exercise judicial functions in India, they preferred sending them out in entire ignorance of the laws they had to administer, leaving their acquisition to actual experience, or rather to a system of experiments, and the result was the establishment of a most cumbersome and costly system of appeals from one court to another—in fact, to a series of courts. The learned Reader remarked that under peculiar circumstances the ancient people of India were induced to withdraw

the legislative power from the hands of the executive and entrust it exclusively to the holy sages. He then showed the state of the primitive law, and how at various epochs it underwent alterations at the hands of different compilers and commentators until it became reduced to the form of the five schools prevailing in the present age. The causes which led to this remarkable revolution he thus described on the authority of Rajah Roy. At an early stage of civilisation, after the distinction of castes had been introduced amongst the inhabitants of Hindoostan, the second class, the Kshatriyas, were appointed to govern and defend the country, but in consequence of the adoption of arbitrary measures, addiction to despotic practices, and abuse of primitive law, the other classes revolted against the tyranny, and, under the command of the celebrated Parasurama, the son of Jamudagni, and grandson of Bhrigu, the promulgator of the Institutes of Menu, defeated the Royalists, and put to death almost all the males of the tribe. It was then resolved that the legislative authority should in future be confined to the first class, the Brahmins, who were under no pretence to take any share in the government of the State or the management of the revenue, while the second tribe (the Rajpoots) should exercise the executive authority. The sages of the sacred tribe having no expectation of holding, or desire to hold, public offices, or of possessing political power, devoted themselves to literary and scientific pursuits, religious austerities, living in poverty, safe from the agitation produced by the desire of riches and the intrigues and contests for power and ascendancy. Freely associating with all the other tribes, they were able to understand the feelings and sentiments of the community, and to appreciate the justice of their complaints, and thereby to establish such laws as were required, and correct, as their labours proceeded, the abuses that had been created by the second tribe. The obligations the people felt to Parasurama, as well as their veneration for his character, induced them to nominate his grandfather, the sage Bhrigu, as President of the Supreme Legislative Assembly, and Presidents were afterwards appointed to all the other legislative assemblies, as they became established in other parts of the land. This great revolution happened about the end of the twelfth century before Christ, and the legislative assemblies of Bhrigu, Yajnyavalkya, and other sages, met in different parts of the country at or about that time. Taking the latest dates determined by the researches of Jones, Davis, and Colebrooke, as to the eras of the Vedas, and assuming the Institutes of Menu to be, if not of almost coeval date, 300, or even 600 years later, we find that the legislative assemblies spoken of, promulgated their decrees at a period anterior to any system of laws, the Mosaic, perhaps, excepted, of which any remains are extant. These decrees, still in force, with inconsiderable modifications, over one of the most extensive and remarkable divisions of the world, preceded by nearly two centuries the building of Rome and the enactment of the laws of Sparta, by Lycurgus, and by three centuries the revision of those of Athens, by Solon. The Reader then contrasted the causes which

led to the revolution of 1789, in France, with those which led to the revolution amongst the Hindus. In the French cities, and boroughs, and centres of shipping, there existed a system of law founded upon the Roman law. This system of law was antagonistic to the system of law existing in the rural districts of France, the latter, in fact, being almost a perfect embodiment of the feudal law. These contradictory systems were not only antagonistic, but almost inflexible, and, as a consequence thereof, contributed largely to that great conflict of principles, opinions, and interests, which culminated in the revolution of 1789. In England, there were also opposing systems of laws, followed by a different result. We have not been subject to those great revolutions in England, simply because the English law has all been more or less submissive to the Common Law, and the distinction between France and England appears to have been, that each system claimed for itself an entirety in rule and practice, and nominally in principle. In England the Common Law has been in practice, flexible; while decisions have been treated as authoritative, they have not been inexorable. Precedents are held good media and proofs of illustration or confirmation, where they are held to agree with acknowledged principle, but where there is a complex state of facts, our Common Law judges frequently fall back upon what they apprehend to be the spirit of the Common Law, and are guided thereby in their decisions. This flexibility has kept the Common Law practically *pari passu* with the development of society and its actual wants. No one could claim the distinction of scientific law for such a system. But in progress of law, and its adaption to national wants, what has been disparagingly called "judge made law," has often secured this country from that kind of conflict which is so marked and so unfortunate a feature of Hindu and French history. The Reader showed that the Hindu laws might be compared advantageously, not only with the Mosaic laws, but also with the laws framed by Solon on previous models, who had for his guidance the systems of other countries. But they did not admit of a fair comparison with the Institutions of republican Rome; or the more celebrated Institutions of the Empire. The laws of the twelve tables, eulogised as the "Rule of Right" and the "Fountain of Justice," were superseded by the decrees of the Senate, and the annual edicts of the Prætor. The perpetual edict, which was fixed as the invariable standard of Civil Jurisprudence, had no greater permanence than the pre-existing systems. The code prepared by order of Justinian was a compilation from the labours of preceding lawyers, not a pure and original system of jurisprudence like the Institutes of Menu. That code was so unsatisfactory to Justinian himself that it was revoked within six years, and replaced by a new and more accurate edition. A wide disparity is to be expected between the Hindu laws, the production of only one, and that a most remote period, and the Roman jurisprudence, the result of the labours of legislators and the most eminent lawyers, extending over a period of 1300 years, repeatedly recast after long intervals of time, and embracing the laws promul-



gated by the legislature, as well as the decisions of judges and juriconsulta. Notwithstanding all the advantages of the Roman system, it is equally exposed to the censure pronounced on the code of Menu, "that it is not easy to conceive a more rude and defective attempt at the classification of laws than is there presented." Such a defect is unpardonable in the compilers of the Roman laws, who might have better profited by the examples they had in previous codes, but is quite venial in a metrical work of the peculiar character of Menu's Institutes. A code of laws, such as that of Menu professes to be, cannot be compared with the laws of any other country which are known to have been compiled from time to time. Mr. Tagore says, after the expiration of several centuries an absolute form of government again prevailed amongst the Hindus. The first class, amongst whom were the descendants of the sages, having been induced to accept employments in civil and political departments, became entirely dependent on the second (the Rajpoots), and possessed so little consequence and independence that they were obliged to explain away the laws enacted by their forefathers, and to propound new laws according to the dictates of the reigning princes. They became, in fact, merely the mouthpiece of their rulers, and but nominal legislators, and the whole power, whether legislative or executive, was virtually exercised by the Rajpoot kings. Under these circumstances originated the division of the various schools of law which prevailed for nearly 1000 years, until the Mohammedans invaded the country, and, finding it divided amongst hundreds of petty princes, detested by their own subjects, conquered them successively and introduced a despotic system of government, destroying the temples, the universities, and the other sacred and literary establishments of the Hindus. To this change must be ascribed the decline of the arts and sciences, and the subversion of that ancient and remarkable state of civilisation which had existed amongst the Hindus at a time when the greater part of the known world was buried in comparative ignorance. The learned lecturer then pointed out the sources of the law, and the works that were of authority in each of the schools, and the close resemblance between the Hindu system and those of the western world, particularly with regard to the law of adoption and the law of caste. He showed that the Hindus, as far back as the twelfth century before Christ, were by Menu divided into four classes. The ancient inhabitants of Egypt were so divided. The people of Crete were so divided by the laws of Minos. In Attica the people were divided into four classes by Cecrops, and afterwards by Theseus into three, by uniting the sacerdotal and noble. In England we have the aristocracy, the clergy, the gentry, the middle class, or artizan. Mr. Grady treated the subject of Mohammedan law in the same systematic manner, giving a sketch of Mohamet, tracing the sources of the law to the fountain head, and showing the cause of the schisms which led to the division of the two sects, the Soonnahs and the Sheeas, and the points whereon they differed on questions of legal doctrine, and the works which are of authority in each of the schools.

The lecturer then entered into a discussion of the modifications introduced into the native systems of law, and their mode of administration by English positive enactments, and gave a complete and comprehensive narrative of British legislation as applied to the different presidencies, at different periods, from the earliest charter of the first James to the most recent statutes of the present reign. Fulness of detail, clearness of language, and precision of statement marked the learned Reader's handling of the different subjects embraced in this most interesting and erudite lecture.

THE HABITUAL CRIMINALS' ACT.

THE Lord Mayor has received the following communication from the Secretary of State for the Home Department.

*" Whitehall, Nov. 8, 1869.*

" My Lord,—I am directed by Mr. Secretary Bruce to transmit you a copy of the Habitual Criminals' Act, passed in the last session of Parliament, and to call attention to those of its provisions which affect the police and governors of prisons.

" The Act has been framed with a view to the protection of the public from the depredations of detected offenders by restraining them from relapsing into their old habits of crime. For this purpose greatly increased powers have been intrusted to the police, and Mr. Bruce is sure that you will feel the importance of impressing upon all members of the police force of your jurisdiction the necessity which exists for the utmost vigilance and discretion in the exercise of those powers.

" While the first object of the Act is undoubtedly the speedy apprehension and punishment of relapsed criminals, Mr. Bruce wishes it to be ever borne in mind that its powers can and should be so exercised as not only not to interfere with, but as far as possible to assist, the efforts of those who evince a desire to return to a honest life by earning an honest livelihood.

" The term 'chief officer of police' applies to any chief constable, head constable, or other chief officer of any county, borough, and place maintaining a separate police force of its own, and in counties it applies as well to superintendents having charge of divisions.

" The following points appear to Mr. Bruce to demand special attention :—

" That the apprehension without warrant of a licence-holder (s. 3) who is suspected to be getting a livelihood by dishonest means; the apprehension of a person subject to the supervision of the police (s. 8) upon a similar suspicion, and the entry without a search warrant (s. 11) into any premises in search of stolen goods, can only be made by a constable or other police officer under the written authority of the chief officer of police as defined above, and a fresh authority must be given in each case which may arise.

" For the better supervision of criminals a register of all persons convicted of crime in Great Britain will be kept in London, and Mr. Bruce has, under the provisions of the 5th section of the Act,

appointed Colonel Henderson, the Commissioner of the Police in the Metropolis, to superintend this register.

"The returns required under the 6th section from the governor of the prison and the chief officer of police of your jurisdiction must be addressed to 'Colonel Henderson, 4, Whitehall-place, London,' and must be made out on the forms which will be supplied by that officer.

"The holder of a licence is no longer required (s. 4) to report himself personally to the police once a month.—I am, my Lord, your obedient Servant.

E. H. KNATCHBULL-HUGESSEN.

"To the Right Hon. the Lord Mayor of London."

#### THE EDMUNDS CASE.

THE arbitrators to whom the Crown's claim against Mr. Edmunds was referred, and to whom also it was referred to make any recommendation to Her Majesty's government on account of any substantive claim of Mr. Edmunds against the Crown, or on account of any claim against the Crown in consequence of the reports of Messrs. Greenwood and Hindmarch, having sat eleven days in public, having taken evidence and heard counsel, have made their award, finding that there is still due from Mr. Edmunds to the Crown 7142*l.* 13*s.* It may be added that this sum of 7142*l.* 13*s.* is independent of, and in addition to, the sum of 7872*l.* 5*s.* 6*d.* refunded by Mr. Edmunds in September, 1864, making in the whole 15,014*l.* 18*s.* 6*d.*

The following is a verbatim copy of the finding of the arbitrators, the Hon. George Denman and Mr. Charles Pollock :—

"We award and adjudge that, on the taking and adjusting of the accounts in the said order referred to, there is due by the said Leonard Edmunds the sum of 8544*l.* 18*s.*, including the sum of 3033*l.* 16*s.* due from him on account of fees and emoluments received by him in respect to the parchments account.

"And we award and adjudge that there are, having regard to all the circumstances, moral grounds for recommending the Government to relieve the said Leonard Edmunds from a part of the moneys due from him on account of the said fees and emoluments received by him in respect of the said parchments account; that is to say, to the extent of 1402*l.* 5*s.*, and we recommend accordingly.

"And we award and direct that the said Leonard Edmunds do pay to Her Majesty the sum of 7142*l.* 13*s.*, being the amount remaining due from the said Leonard Edmunds upon the taking and adjusting of the said accounts, after deducting the said sum of 1402*l.* 5*s.* And as to the said substantive claims brought before us by the said Leonard Edmunds against the Crown, having regard to all the circumstances of the case, we make no recommendation to the Government in relation to any of such claims.

"And as to the said suit in Chancery, we award, adjudge, and decree that neither party has any claim against the other in

respect of any matters in question in the said suit not concluded by the said decree or by this award.

"And we further award and adjudge that each party do pay his own costs, as well of the said Chancery suit as of the reference; and that the Crown and the said Leonard Edmunds do each pay a moiety of the costs of the award."

A document, dated December 14th, 1869, and signed with the initials of three Lords of the Treasury, and of the then permanent secretary, has been issued, in which their lordships' decision regarding the Edmunds case is indicated. They say that they have had under their consideration the award made by the arbitrators in the suit of the Attorney-General against Edmunds, and the action of Edmunds against Greenwood. By that award it appeared that Mr. Edmunds stood indebted to the public in no less a sum than 8544*l.* 18*s.* In accordance with the recommendations of the arbitrators, their lordships are willing to relieve Mr. Edmunds from the payment of 1402*l.* 15*s.*, referred to in the award as having been received by him in respect to the parchments account; and, with regard to the balance, they direct that the necessary steps be taken for its recovery. They consider it their duty to offer some remarks with reference to a part of the proceedings. Their lordships observed with pain and surprise, during the progress of the suit, the persevering efforts made by Mr. Edmunds to "vilify and misrepresent" the motives of their solicitor, Mr. Greenwood. They take the earliest fitting opportunity of declaring that all such imputations are utterly groundless and unwarrantable. The award made fully justifies the report made by Messrs. Greenwood and Hindmarsh, that Mr. Edmunds had been in the habit of receiving, and appropriating to his own use, sums of money which, in their opinion, belonged to the public. Their lordships deemed it necessary to express their most emphatic condemnation of a part of the defence set up by Mr. Edmunds, namely, that because, in his own opinion, he was insufficiently paid by his settled salary for his services, he was therefore at liberty to put his hand into the till of his office, and help himself to a sum of public money sufficient to satisfy his own views of the value of those services.

#### THE LATE LORD JUSTICE SELWYN.

LORD JUSTICE GIFFARD, on taking his seat in court on the first day of Michaelmas Term, said—"It is impossible that this court can resume its sittings without recurring to that which on this day is doubtless present to the minds of all in both branches of the Profession—namely, the loss we have all sustained by the death of the late Lord Justice Selwyn. He was called to the Bar in 1840, became a Queen's Counsel in 1856, and afterwards attained the office of Solicitor-General, and was appointed to the Bench, having had in these courts a practice of twenty-seven years, successful from the commencement of his career, and not on the whole inferior to that of any of his contemporaries. It was to be expected, therefore, that he would administer the law of which he had so much experience

with ability and decision, nor was that expectation in any respect disappointed. It was my lot, and, I may add, my happiness, to be associated with him as his junior on the Bench, and though that was a few, a very few months only, I may be permitted to say how certain I am that no man could have brought to the discharge of his duties a more complete and ready knowledge, a more manly judgment, a more anxious desire that in every case truth and justice and right should be done. His memory is also dear to us all as that of a true and sincere personal friend."

#### GREEK READINGS.

THE Rev. Dr. Vaughan, Master of the Temple, began his first series of readings in the Greek Testament, on the first day of Michaelmas Term, in the Middle Temple Library; his subject for the term being St. Paul's Epistle to the Colossians. The Master resumed his readings on the first day of Hilary Term, the subject being St. Paul's Epistle to the Galatians. These readings are intended primarily for members of the Inns of Court; they are open also to all clergymen of the Church of England or other communions, and to graduates of any University.

#### LORD JUSTICE CLERK.

LORD JUSTICE CLERK MONCRIEFF opened the lecture session of the Philosophical Institution in Edinburgh with an address on "The union of the Crowns and union of the Kingdoms of Scotland and England." His lordship traced the beneficial effects which had been produced by those two important public events on the progress and social condition of the country. He remarked that it was not without pride that Scotchmen could look at the conditions under which the two countries were originally connected, and at the results which had ensued from our mutual amity.

#### THE IRISH MASTER OF THE ROLLS.

THE Right Honourable Edward Sullivan on taking his seat for the first time in the Rolls Court, said, in the presence of a large attendance of the Bar and others, who were there to greet him:—

"Mr. Sherlock and Gentlemen of the Bar—I cannot take my seat on this bench without shortly adverting to the very melancholy and sudden event which removed from this seat the late Master of the Rolls. I had not as many opportunities as other gentlemen may have had of observing the manner in which he discharged his duties, but some I had, and I feel bound to say that no man appeared to me to have brought to his official duties a more earnest desire to act with impartiality and justice on every occasion. He discharged them with marked courtesy towards every one of either profession who came before him."

#### PUBLIC PROSECUTORS.

THE question of the appointment of official public prosecutors in lieu of the present objectionable system of prosecution by volunteers, continues to excite great attention. At many of the last Courts of

Quarter Sessions this subject was brought forward. In Gloucestershire Mr. Serjeant Pulling, at the request of some of his brother magistrates, went fully into the plan proposed by him in his paper read at the last Social Science Congress. The serjeant was listened to with great attention, most of the influential magistrates of the county being present. It is rumoured that the Government are prepared to deal at once with this important matter.

#### THE INNER TEMPLE HALL.

THE new hall of the Inner Temple is thus described in the *Builder* : —“It occupies the site of the ancient hall of the Knights Templars, but has been greatly extended in all its dimensions. The new hall is ninety-four feet by forty-one feet, and its height to the wall plate is forty feet. The previous hall was seventy feet by twenty-nine feet, and the height of the wall plate twenty-three feet. In rebuilding their hall, the Benchers have availed themselves of the opportunity to greatly extend and improve the domestic offices, to provide commodious robing-rooms, lavatories, &c., for the use of the members and students, and to obtain better clerks' offices. New offices have also been built for the treasurer, and the Parliament chamber has been increased in size. The exterior masonry is in Portland stone. The interior of the hall is built of the hardest Bath stone. The roof, screen, and wall linings are all executed in wainscot. The hall is warmed and lighted by sunburners in the roof, and by sixteen bracket-lights against the walls. The oriel window at the upper end of the hall is glazed with stained glass in armorial devices. The rest of the windows are glazed ornamentally in leaded lights and plain glass, but it is believed to be the intention of the benchers ultimately to glaze the whole of the windows with richly-coloured devices, illustrative of the history of the Temple.

#### LEGAL PROCEEDINGS AGAINST SOLDIERS.

A WAR Office circular has just been issued on a subject to which certain recent prosecutions have imparted considerable importance. It is dated January 1, 1870, and promulgates regulations for carrying out legal proceedings in connection with the army :—

“1. All offences committed by persons subject to the Mutiny Act against the ordinary criminal code of the country brought to the cognisance of the commanding officer, should forthwith be notified by him to the local police, that the same may be duly investigated by their agency, and punished by the civil criminal tribunals.

“2. Until the Secretary of State directs the solicitor to the War Department to take charge of any legal proceedings, or to reimburse the cost, he will incur no responsibility on account thereof.

“3. When authority is sought to commence or to defend legal proceedings either in the name or on behalf of the Secretary of State, a full statement of the facts must be sent up to the Under-Secretary of State, authenticated by the head of the department at home or by the general officer abroad.

“4. Where officers or soldiers are made defendants in civil or

criminal proceedings, the defence thereof will be conducted upon the sole responsibility of such defendant, until the decision of the Secretary of State is given.

"5. When, in such cases, any claim is preferred to the Secretary of State for assistance in or for the reimbursement of the cost of the defence, it must clearly be shown with reference to the declaration or indictment (of which a copy should be sent with the application), that the act complained of was one sanctioned by competent authority or clearly within the prescribed course of the defendant's duty.

"6. At home, in cases of murder, where the accused and the deceased were both subject to the Mutiny Act, the commanding officer will request the magistrates forthwith to transmit a copy of depositions taken before them to the War Office, that the case may (if the Secretary of State deems it expedient that a more speedy trial of the accused should be had than the usual course of practice allows) be prepared for trial by the solicitor to the department; under the jurisdiction in Homicides' Act, 1862.

"7. Abroad, where the adoption or the defence of legal proceedings cannot wait the previous sanction of the Secretary of State, they should only be taken on the special authority of the general officer commanding, to whom a report of the circumstances of the case, together with a statement showing the probable expenses, will be addressed by the head of the department on whose recommendation the legal proceedings are proposed to be taken.

"8. These reports, together with the letter of the general or other officer commanding, authorising legal proceedings, will be forwarded by the head of the department concerned to the Secretary of State for War for approval; and in no case will the expenses incurred be admitted as a charge against the item for 'law charges,' vote 17, unless they have received such approval.

"9. When legal proceedings have been authorised, the head of the department concerned will from time to time furnish the legal adviser of the War Department with such information and assistance as he may require, and keep the Secretary of State advised as to the course being pursued."

The other clauses relate to the charges of legal advisers, &c.

#### THE GRAND JURY SYSTEM.

On a paragraph referring to the grand jury system in the report of the committee appointed by the Middlesex magistrates to consider the question of expediting the despatch of the criminal business of the county, which stated that attention had been directed to the fact that the present system of sending cases before grand juries tended to delay the trial of prisoners, and that, in the opinion of the committee, the administration of justice at the Quarter Sessions would be much facilitated by the withdrawal of cases awaiting trial from the cognisance of the the grand jury, at the quarterly meeting Mr. Serjeant Payne moved the following resolutions:—

"1. That the system of trial by jury, of which the grand jury

forms a part, is a great bulwark of national liberty, especially in political cases, and should be upheld in all its integrity, inasmuch as by the laws of this realm, confirmed by Magna Charta, no person can be put upon his trial for a criminal offence until after indictment found against him by twelve men constituted as a grand jury.

"2. That in petty stealings and other small offences which have been investigated by a police magistrate previous to commitment, the proceedings before the grand jury might be much expedited by the assistant-judge pointing out such cases to them as unnecessary to occupy their time further than the returning true bill, in order that the parties may be legally and constitutionally put upon their trials.

"3. That by this means the right of a thorough investigation by a grand jury will be preserved in all cases in which it may be deemed important to the public interests."

Mr. SERJEANT PAYNE having given an historical account of the system, and cited instances in which the innocent had been protected by it, said it seemed to him that the proposition to dispense with trial by grand jury was a very monstrous one. Attempts of the same kind had been made more than once, and to the credit of Sir George Grey he said he opposed them in his capacity as Home Secretary, and they were defeated, and never obtained the force of law. It was, therefore, with very great surprise that he had heard of the proposition advanced by the committee. In his opinion the grand jury system was of great importance, not only in finding bills against prisoners, but in ignoring indictments in cases where there was not sufficient evidence to send a man for trial.

Sir J. C. LAWRENCE seconded the motion, and observed that from his own magisterial knowledge he had no hesitation in saying that the grand jury system was the greatest possible security to the rights and liberties of the people.

Mr. Serjeant Cox said he had very considerable experience in reference to the trial of accused persons sent to that Court, and he had come to the conclusion that it would be impossible to abolish the grand jury system entirely. He thought, however, there were a great many cases in which the preliminary investigations made by a grand jury were altogether unnecessary, and that there were other cases in which it was required, and he did not think that it would be difficult for the Legislature to define the class of cases in which inquiry ought to be made. It was well known that a Bill was about to be brought before Parliament for the purpose of regulating the principle upon which the whole system of grand juries was founded, and he would suggest that the motion before the Court should be postponed until they saw what course the Legislature intended to pursue on the subject.

After some observations from Mr. R. N. Phillips, Mr. Twentyman and Mr. Turner, Mr. Serjeant Payne withdrew his motion.

It may be remembered that in the *LAW MAGAZINE AND REVIEW* of February, 1869, in an article entitled, "Considerations on the facilitating Proceedings in Criminal Matters," this subject was care-



fully discussed, and attention was drawn to a clause in the Bill for Regulating the Police Courts of the Metropolis, 1839, by which a magistrate might order an indictment to be prepared, the presentment of which by the chief clerk would have the same effect as if it had been found by a grand jury. We believe this would work well, more especially if there was a provision enabling a prisoner to demand a grand jury. It would lessen the labour of judges and grand jurors, while it would frequently prevent the miscarriage of justice. We have known cases where a prisoner would gladly have pleaded guilty before the magistrates, but they, being of opinion the charge was too important to be dealt with summarily, sent the case before the grand jury, who having misunderstood the evidence found no bill, and the prisoner, to his great astonishment, was discharged.

#### SPRING CIRCUITS OF THE JUDGES.

THE spring circuits are settled as follows, viz. : Home — Chief Justice Cockburn and Mr. Justice Keating ; Northern—Mr. Justice Willes and Mr. Justice Brett ; Western—Lord Chief Baron and Mr. Justice Hannen ; Midland—Mr. Justice Montague Smith and Mr. Baron Cleasby ; Oxford—Mr. Baron Martin and Mr. Justice Lush ; Norfolk—Mr. Justice Byles and Mr. Justice Blackburn ; South Wales—Lord Chief Justice Bovill ; North Wales—Mr. Baron Channell. Mr. Baron Pigott remains in town.

#### MR. JOHN TIDD PRATT.

MR. JOHN TIDD PRATT, for many years registrar of friendly societies, died at 29, Abingdon Street, S.W., in his seventy-second year, on January 9th. The deceased gentleman was called to the Bar at the Inner Temple in 1824, and in addition to his office as registrar of friendly societies, held a post in the National Debt Office, and was the barrister appointed to certify the rules of savings banks. He was the author of "Laws relating to Friendly Societies," "A Collection of the Public General Statutes," "The History of Savings Banks," "The Laws of Highways," "An Analysis of the Property Tax Act," "Suggestions for the Establishment of Friendly Societies," and other works of a similar character. In the latter years of his life he rendered efficient service to the public in disclosing, so far as official restraint would permit him, the unsound condition and business of some of the benefit, friendly, and similar societies.

#### MR. T. B. BURCHAM.

MR. PARTRIDGE, on taking his seat in the Southwark Police Court on the Monday following, thus alluded to the death of Mr. Burcham :—"It is my painful duty to have to mention that shortly after I left the Bench on Saturday evening last the melancholy intelligence reached me that my colleague, Mr. Burcham, was no more. He died at his residence on Saturday afternoon at half-past one, after a painful and lingering illness, which he bore with the utmost fortitude and resignation. In spite of his bodily infirmities he manfully struggled to the last to discharge his public duties. My late lamented

colleague was a refined and elegant classical scholar, an able lawyer, and a humane and impartial magistrate. His decisions were regarded with the greatest confidence. He was deservedly esteemed throughout his district by both rich and poor, and I should fail to do justice to my own feelings if I did not pay this last tribute of respect and regard to his memory." The deceased magistrate, Mr. Thomas Borrow Burcham, M.A., was sixty-one years of age. He was educated at the Norwich Grammar School, when the late Dr. Valpy was head master. He entered Trinity College, Cambridge, where he graduated as B.A. in 1830, and in 1832 was elected fellow of his college. He was called to the Bar at the Inner Temple in 1843, and selected the Norfolk circuit. He was for some years one of the classical examiners, and an examiner of mental philosophy in the London University, both of which he resigned on his appointment as magistrate at the Southwark court, on the death of Mr. Gilbert Abbott à Becket, in 1856. He also resigned his recordership of Bedford at the same time.—*Law Times*.

#### CONSULAR JURISDICTION IN EGYPT.

A TELEGRAM dated Cairo, January 3rd, states that the International Commission for reforming the jurisdiction of the Consular Courts in Egypt has elected a committee, consisting of the English, Austrian, French, and Italian representatives. Nubar Pasha has been appointed president. The committee has accepted as the basis of its deliberations a system of three courts of justice, to be established at Alexandria, Cairo, and another place. A court of appeal is to be fixed at Alexandria, and a court of last appeal at Cairo. European judges will be appointed for five years, and paid by the Egyptian Government.

#### MR. W. M. BEST.

WE deeply regret to announce the death of Mr. William Mawdesley Best, which occurred rather suddenly on the morning of November 17th. Mr. Best was called to the Bar in June, 1834, and therefore had been a member of the profession for a very long period of years. He was a member of the Home Circuit, and had been elected a Bencher of Gray's Inn some few years before his death. He had been educated at Trinity College, Dublin.

Mr. Best had not a practice at the Bar at all in proportion to the powers of his mind and the breadth and depth of his learning. In a profession so peculiar to its character as the Bar, we must expect to find many examples of men whose intellectual qualities give them the fairest claims to wealth and fame, but who yet do not succeed in obtaining those objects of human ambition. It is not necessary to speculate on the *raison d'être* of such examples, but it is by no means difficult to explain them. The fact that Mr. Best was the author of the treatise on evidence, which is perhaps the most scientific legal work of the present century, failed to rally clients to his standard; but though he did not become 'distinguished' in the ordinary sense of the term, he has achieved a

reputation capable of surviving that of many "brilliant" advocates. Mr. Best was also known as the colleague of Mr. George James Philip Smith in the publication of the series of reports in the Queen's Bench commencing in Easter Term, 1864, and succeeding the series known as "Ellis and Ellis." On the sitting of the Court of Queen's Bench on Wednesday last, the Lord Chief Justice made the following observations on the death of Mr. Best:—"It will not be out of place to take notice of the communication which has just been made to us of the death of one of the reporters of this Court—Mr. Best—and to express our great regret at the loss which the profession has sustained, as well as our sense of the fidelity, accuracy, and ability with which he discharged his duty as authorised reporter of this Court, in conjunction with his colleague, who, I am glad to say, still remains among us. The manner in which the duty has been discharged has given us the greatest satisfaction."—*Law Journal*.

#### ELECTION JUDGES.

THE Judges for the trial of Election Petitions in England, for the ensuing year will be, Mr. Justice Mellor, Mr. Justice Byles, and Baron Bramwell. Those for Ireland, The Right Hon. Mr. Justice Fitzgerald, the Right Hon. Mr. Justice Morris, and the Hon. Baron Hughes.

WE regret we have not space in this number to refer to the three Scotch Judges and Mr. Justice Hayes, recently deceased. In our next we hope to be able to give a sketch of the life of each.

#### CALLS TO THE BAR.

##### *Michaelmas Term.*

INNER TEMPLE.—Lacklan Mackintosh Rate, Esq., M.A., Cambridge; Charles Septimus Medd, Esq., M.A., Oxford, Certificate of Honour, first class, awarded in this present Michaelmas Term; William Whitley, Esq., Cambridge; Henry Arthur Maylett, Esq., Evans, Esq., Rudolph Herries Spearman, Esq., Oxford; Francis Mills, Esq., M.A., Oxford; Francis Michael Ellis Jervoise, Esq., B.A., Oxford; Walter Freeman Hunt, Esq., B.A., Cambridge; Henry Aloysius Stoke Stackle, Esq., Thomas Alexander Apcar, Esq., Cambridge; William Edwardes Henniker Forsyth, Esq., B.A., Cambridge; Henry John Bardwell Thwaites, Esq., B.A., Cambridge; George Candy, Esq., M.A., Oxford; William Wybergh, Esq., Gualter Craddock Griffith, Esq., George Ernest Wright, Esq., B.A., Cambridge; William Reynell Anson, Esq., M.A., Oxford; William Henry Hackblock, Esq., B.A., Cambridge; Samuel Porter Foster, Esq., B.A., Cambridge; Robert Grant Webster, Esq., B.A., Cambridge; Samuel Leigh Taylor, Esq., B.A., Cambridge; Courtenay Tracy, Esq., LL.B., Cambridge; The Hon. Robert St. John Fitz Walter Butler, B.A., Dublin; Francis Culling Carr, Esq., James Patrick Hadow Esq., B.A., Oxford; Benjamin Eyre, Esq., B.A., Dublin; Edward Arundel Geare, Esq., B.A., Cambridge; Charles

Thomas Dyke Acland, Esq., M.A., Oxford; Henry Hodgson Bremner, Esq., Cambridge, holder of an Exhibition awarded in July last; William Henry Lockhart Gordon, Esq., B.A., Cambridge; and William Arnold Lewis, Esq.

MIDDLE TEMPLE.—Thomas Brett, Esq., scholar, student, and A.B., Trinity College, Dublin, LL.B., London University, holder of Exhibitions in Real Property and Equity, July, 1868, and of a Certificate of Honour awarded by the Council of Legal Education, Michaelmas Term, 1869; Edmund Philip Greening, Esq.; Thomas Burfield, Esq., LL.B., Trinity Hall, Cambridge; Edward Beal, Esq., B.A., Trinity Hall, Cambridge; Richard Egerton, Esq., B.A., Junior Student, Christ Church, Oxford; Henry Bowles Franklyn, Esq., of the Universities of London and Paris, and Associate of King's College, London; Edward Russell Withers, Esq.; Sydney Grundy, Esq.; Henry Thomas Webb Greene, Esq., B.A., Trinity Hall, Cambridge; Ernest Carpmal, Esq., of St. John's College, Cambridge; John Edward Noet, Esq.; James Mudie, Esq.; Noel Huntingdon Paterson, Esq., B.A., St. John's College, Oxford; Charles Pavin Bird, Esq.; Thomas Howes Roberts, Esq.; James Francis Oswald, Esq., of St. Edmund Hall, Oxford and Stanes Brocket, Henry Chamberlayne, Esq., of Christ Church, Oxford; Right Hon. George Young, Q.C., Lord-Advocate of Scotland.

LINCOLN'S-INN.—Charles Henry Turner, Esq., University of London, holder of the Exhibition at the general examination of the Michaelmas term, 1869, also exhibitor for Advanced Common Law in July, 1868; for Advanced Equity in July 1869; and for Advanced Real Property Law, &c., in the same year; Joseph Alexander Shearwood, Esq., Cambridge, B.A., Certificate of Honour, Michaelmas Term, 1869; Everard Thomas Luck, Esq., Cambridge, B.A.; Henry Lucas, Esq.; William John Anderson, Esq., Oxford; George Royer Dick, Esq., Cambridge, M.A.; Reginald James Mure, Esq., Oxford, B.A.; James George Wood, Esq., Fellow of Emmanuel College, Cambridge, M.A.; William Stephen, Esq., late of M'Gill College, Montreal; Frederic George Luke, Esq., Cambridge, B.A.; Frederick William Groves, Esq., London, M.A.; George Nichols Marcy, Esq.; Henry Martin Taylor, Esq., Fellow of Trinity College, Cambridge, M.A.; Thomas Henry Carson, Esq., Dublin, B.A.; and Limjee Nowrojee Bunnajee, Esq., London.

*Hilary Term, 1870.*

MIDDLE TEMPLE :—Frederick Augustus Knight, Esq.; Alexander Nevay, Esq., of the Scotch Bar; Hugh William Boyd Mackay, Esq., LL.B., Trinity College, Dublin (of the Irish Bar); Alfred Chichele Plowden, Esq., B.A., Brasenose College, Oxford; John Jepson Atkinson, Esq., Exeter College, Oxford; William Warden, Esq., B.A., Exeter College, Oxford; Andrew Duncan, Esq., B.A., Pembroke College, Cambridge; Donald Ninian Nicol, Esq., B.A., Queen's College, Oxford; James Stoddart Porteous, Esq.; William Archbutt Pocock; Henry Rogers Beor, Esq., B.A., St. John's College, Cambridge; George Jarvis

Notcutt, Esq.; Joseph Haworth Redman, Esq.; John Raymond, Esq.; Henry Forester Leighton, Esq.; James Samuelson, Esq., of New Inn Hall, Oxford; George Francis Travers Drapes, Esq., B.A., LL.B., Trinity College, Dublin; Albert Lewis, Esq.; Remy Ollier, Esq.

INNER TEMPLE:—Arthur Denman Smith, Esq., LL.B., Cambridge; Edward Ripley, Esq., B.A., Oxford; Charles Elsley, Esq., B.A., Cambridge; Frederic Ayres, Esq., Cambridge; Louis Henry Phillips, Esq.; Henry Mills Skrine, Esq., B.A., Oxford; Mervyn Standish De Montmorency, Esq., B.A., Oxford; Peter Burrowes Hutchins, Esq., B.A., Oxford; Ludlow Handcock, Esq., B.A., Dublin; William George Huband, Esq., B.A., Dublin; John Henry Oglander Glynn, Esq., LL.B., Cambridge; Carlile Henry Hayes Macartney, Esq., B.A., Cambridge; Robert Charles Paxton, Esq., B.A., Cambridge; John Amphlett, Esq., Oxford; Leopold John Manners De Michele, Esq., Cambridge; Robert Wilbraham Jones, Esq.; the Hon. Dudley Oliphant Murray; William Jerrold Dixon, Esq.; Edward Herbert Draper, Esq., B.A., Cambridge; William Blagdon Gamlen, Esq., B.A., Oxford; Edward Stanley Robertson, Esq., B.A., Dublin; Francis Edward Cunningham, Esq., B.A., Cambridge; William Heurtley Newnham, Esq., B.A., Oxford; Charles Gould, Esq.; George Gumbleton, Esq., M.A., Oxford; and John von Sonnentag De Havilland, Esq.

#### BAR EXAMINATION.

*Michaelmas Term, 1869.*

At the general examination of students of the Inns of Court, held at Lincoln's-inn Hall, on the 28th, 29th, and 30th October, and the 1st November, 1869, the Council of Legal Education awarded to George Lewis, Esq., student of the Middle Temple, a studentship of 50 guineas per annum, to continue for a period of three years; Charles Henry Turner, Esq., student of Lincoln's-inn, an exhibition of 25 guineas per annum, to continue for a period of three years; Thomas Brett, Esq., student of the Middle Temple, Joseph Alexander Shearwood, Esq., student of Lincoln's-inn, and Charles Septimus Medd, Esq., student of the Inner Temple, certificates of honour of the first class.

George Candy, Esq., student of the Inner Temple, Henry Bowles Franklyn, Esq., student of the Middle Temple, Thomas Goodman, Esq., student of the Middle Temple, William Meigh Goodman, Esq., student of the Middle Temple, Frederick William Groves, Esq., student of Lincoln's-inn, James Cholmondeley Kaufmann, Esq., student of the Inner Temple, Henry Forester Leighton, Esq., student of the Middle Temple, Frederic George Luke, Esq., student of Lincoln's-inn, James Mudie, Esq., student of the Middle Temple, and George Jarvis Notcutt, Esq., student of the Middle Temple—certificates that they have satisfactorily passed a general examination.

EXAMINATIONS AT THE INCORPORATED LAW SOCIETY.

*Michaelmas Term, 1869.*

At the final examination of candidates for admission on the roll of attorneys and solicitors of the Superior Courts the examiner recommended the following gentlemen under the age of twenty-six, as being entitled to honorary distinction :—Henry Summer Sewell; William Frederick Beardsley; Francis William Sancroft Damant; John Rayner Cooper; Theodore Lumley; Charles Cornish Brown.

The Council of the Incorporated Law Society have accordingly awarded the following prizes of books :—To Mr. Sewell the prize of the Honourable Society of Clifford's Inn; to Mr. Beardsley, the prize of the Honourable Society of Clement's Inn; to Mr. Damant, Mr. Cooper, Mr. Lumley, and Mr. Brown, prizes of the Incorporated Law Society.

The examiners also certified that the following candidates, under the age of twenty-six, passed examinations which entitle them to commendation :—John Seymour Fowler; Arthur Crabtree Procter; Edmund Theodore Radcliff; Higson Simpson.

The council have accordingly awarded them certificates of merit.

The examiners further announced to the following candidates that their answers to the questions at the examination were highly satisfactory, and would have entitled them to certificates of merit if they had not been above the age of twenty-six :—William Boycott; George Stuart Evett, B.A.; Robert Martin; James Midgeley; George Presswell.

The examiners also reported that among the candidates from Liverpool in the year 1869, Mr. J. S. Fowler passed the best examination, and was, in the opinion of the examiners, entitled to honorary distinction; that Mr. M. P. Jones and Mr. J. W. Alsop, B.A., were respectively second and third in order of merit among the candidates from Liverpool in the year 1869, and were, in their opinion, entitled to honorary distinction.

The council have therefore awarded to Mr. Fowler, Mr. Jones, and Mr. Alsop respectively the prize, consisting of a gold medal, founded by Mr. Timpron Martin, of Liverpool.\*

The gold medal founded by Mr. John Atkinson, for candidates from Liverpool or Preston, who have shown themselves best acquainted with the law of real property, and the practice of conveyancing, has been also awarded to Mr. Fowler, Mr. Jones, and Mr. Alsop respectively.

The examiners also reported that among the candidates from Birmingham in the year 1869, Mr. E. T. Ratcliff was entitled to honorary distinction.

The council have accordingly communicated this report to the Birmingham Law Society.

\* The prizes awarded to Mr. Jones and Mr. Alsop were withheld in the years 1867 and 1868.

Mr. Courtney Stanhope Kenny having, among the candidates in the year 1861, shown himself best acquainted with the law of real property and the practice of conveyancing, the council have awarded to him the prize, consisting of a gold medal, founded by Mr. Francis Broderip, of Lincoln's-inn.

The number of candidates examined in this term was 120; of these 113 passed, and seven were postponed.

#### APPOINTMENTS.

THE honour of knighthood has been conferred on Mr. Roger Therry, for many years a Judge of the Supreme Court of New South Wales.

The honorary degree of D.C.L. has been conferred on the Right Hon. John Robert Mowbray, M.P.

The following gentlemen have been appointed Her Majesty's counsels :—Mr. A. R. Adams, Mr. W. C. Fooks, Mr. A. S. Eddis, Mr. D. Brown, Mr. H. F. Bristow, Mr. P. H. Edlin, Mr. Thomas Hughes, Mr. Joseph Kay, Mr. M. Bere, Mr. Henry James, Mr. H. C. Lopes, Mr. Osborne Morgan, Mr. Edward Fry, and Mr. S. Pope.

Mr. Henry J. Sumner Maine, LL.D., late Legal Member of the Council of India, has been elected to fill the new Professorship of Jurisprudence in the University of Oxford.

Mr. T. K. Lowry, Q.C., late a District Judge at St. Ann's and St. Mary's, in the island of Jamaica, has been appointed to the Prothonotaryship of the new District Court at Manchester, under the Act of last session.

Mr. Franklin Lushington has been appointed to the police magistracy, vacated by the death of Mr. Burcham.

Mr. R. R. W. Lingen, of Lincoln's Inn, has been appointed permanent secretary to the Treasury, in succession to the Right Hon. G. A. Hamilton.

Sir Francis H. C. Doyle, Bart., of the Inner Temple, has been appointed a Commissioner of Customs in the room of the late Mr. Ralph W. Grey.

Mr. G. W. Dassent, D.C.L., of the Middle Temple, has been appointed by the Government to the post of Civil Service Commissioner.

Mr. J. F. Collier, of the Western Circuit, has been appointed Recorder of Poole, in the place of Mr. Bullar deceased; Mr. S. B. Bristowe, of the Midland Circuit, Recorder of Newark; and Mr. F. J. Smith, of the Home Circuit, Recorder of Margate.

Mr. Wales C. Hotson, barrister-at-law, of the Norfolk Circuit, has been appointed by the Dean and Chapter of Norwich, to be capital coroner within their liberties, and a justice of the peace for the cathedral precincts, in the room of the late Chancellor Evans, deceased, and he has also been appointed a surrogate or deputy of the Chancellor of the diocese of Norwich.

Mr. Aldridge and Mr. Sykes, the official solicitors under the Bankruptcy Act of 1861, have been appointed by the Lord

Chancellor the official solicitors under the new Act of 1869, in all cases where no trustee shall be appointed and during any vacancy in the office of trustee, and to act generally for the registrars of the Court in cases where their services may be required.

Mr. Mansfield Parkyns, one of the official assignees of the Old Court of Bankruptcy, has been appointed controller in Bankruptcy.

Mr. T. D. Brogden, barrister-at-law, has been nominated to a law studentship at St. John's College, Cambridge.

Mr. William Sutton Page, solicitor, has been appointed clerk to the Commissioners of Income Tax acting in and for the district of the city of Norwich, in the room of Mr. R. Field, deceased. Mr. William Thomas Bensly, LL.D., solicitor, Chapter Clerk to the diocese of Norwich, in succession to the late Mr. John Kitson. Mr. Henry Greene, Deputy-Recorder and Steward for the borough of Higham Ferrers, on the resignation of Mr. George Burnham. Mr. Arthur Burch, solicitor, Secretary to Dr. Temple, the Bishop of that diocese. Mr. Charles Berkeley Margetts, solicitor, Registrar of the Huntingdon County Court, in succession to the late Mr. Charles Margetts. Mr. John Watson, Mayor of Durham, Clerk of the Magistrates for the Petty Sessional Division, in the room of Mr. J. W. Hays, resigned. Mr. W. M. Mortimer, solicitor, Registrar of the Newcastle-on-Tyne County Court, in the place of Mr. John Clayton, resigned. Mr. J. H. Boyes, solicitor, Coroner of Margate. Mr. Ralph Bayshaw, Junr., Deputy-Coroner for the Northern Division of the County of Warwick, in the room of the late Mr. Blagg. Mr. Thomas Llewellyn, solicitor, Clerk to the Justices of the Burslem and Tunstall Divisions, in the room of Mr. J. R. Rose, deceased. Mr. Francis W. Jones, solicitor, Clerk of the Peace for the city of Gloucester and county, in the room of the late Mr. Charles Smallridge. Mr. Thomas Mallam, solicitor, Clerk to the Magistrates of Oxford, in the room of the late Mr. Henry Jacob, deceased. Mr. B. Campbell, solicitor, Clerk to the Magistrates of the Warwick District, in the room of the late Mr. F. Tibbits. Mr. Arthur Wilson, solicitor, Clerk to the Magistrates of the Banbury District, in the place of the late Mr. T. G. Judge. Mr. E. J. C. Davies, solicitor of Crickhowell, Clerk to the Magistrates of the Blackwood Division of the County of Brecon, in the room of the late Mr. Watson, deceased. Mr. E. C. Peele, solicitor, Town Clerk of Shrewsbury, in the room of Mr. J. J. Peele, resigned. Mr. H. T. Sankey, solicitor, Clerk of the Peace for the Borough of Margate. Mr. R. J. Walker and Mr. Frederick Butler, Joint Clerks to the Magistrates of the Manchester Division, in the room of the late Mr. W. S. Rutter. Mr. F. J. Chester, solicitor, Clerk to the Newington Vestry, in the room of the late Mr. Henry Chester. Mr. A. H. Hunt, solicitor, Clerk to the Guardians of the Orsett Union. Mr. George Wire, solicitor, Clerk to the Dorrington Turnpike Trustees. Mr. Joseph Harker, solicitor, Clerk to the Burial Board of Poole, Dorset. Mr. George Harper and Mr. F. L. S. Safford, solicitors, Clerk to the



**Local Board of Hadleigh.** Mr. T. E. Paget, solicitor, District Prothonotary at Liverpool. Mr. R. Y. Green, solicitor, Under-Sheriff of Newcastle-upon-Tyne. Mr. A. R. Rollitt, LL.D., solicitor, Under-Sheriff of Hull. Mr. Frederick Cobbett, solicitor, Under-Sheriff for Worcester. Mr. F. T. Keith, solicitor, reappointed Under-Sheriff for the city of Norwich. Mr. George Brown, solicitor, Under-Sheriff for York. Mr. David H. Owen, solicitor, District Registrar of the Court of Probate at Norwich, in the room of Mr. John Kitson, deceased.

**IRELAND.**—The Right Hon. Edward Sullivan, Attorney-General, has been appointed Master of the Rolls, in the room of the Right Hon. J. E. Walsh, deceased.

Mr. C. R. Barry, Solicitor-General, has been appointed Attorney-General, in succession to the Right Hon. Edward Sullivan, appointed Master of the Rolls.

Mr. Edward Barry has been appointed Secretary to the new Master of the Rolls.

Mr. William C. Mulholland, barrister-at-law, has been appointed a Circuit Crown Prosecutor, on the North-east Circuit, for the County of Monaghan.

Mr. Michael Francis Dwyer, barrister-at-law, has been appointed Chief Registrar in the Registry of Deeds Office, in the place of Mr. Morgan O'Connell, resigned.

**SCOTLAND.**—Mr. William Lamond, Advocate, has been appointed Sheriff-Substitute of Fifeshire at Dunfermline, in room of Mr. Beatson Bell, transferred to Cupar to fill up the vacancy occasioned by the resignation of Mr. Taylor.

Mr. Robert Laidlaw Stuart, W.S., has been appointed Procurator-Fiscal for Mid-Lothian in the place of Mr. Maurice Lothian, resigned.

**INDIA.**—Mr. Fitzjames Stephen, Q.C., has been appointed Legal Adviser to the Indian Government, in the place of Mr. Mayne, who returns superannuated.

Mr. J. F. Marsden has been appointed to officiate as Professor of English Law in the Presidency College, Madras, in the absence of Mr. J. A. Branson.

**JAMAICA.**—John Lucie Smith, Esq., has been appointed Chief Justice of the Island of Jamaica.

Mr. Constantine Brooke, solicitor, has been appointed Crown Solicitor to the Government of Jamaica.

---

## Necrology.

### *September.*

23rd. COMBE, Matthew, Esq., Barrister-at-Law, aged 46.

### *October.*

14th. MANOR, Lord, a Judge of the Scotch Court of Session, aged 67.

15th. HAWKINS, R. R. A., Esq., Barrister-at-Law, aged 55.

19th. ROTHERY, Charles F., Esq., Barrister-at-Law, Assistant-Judge of the Colony of the Bahamas.

29th. PACKWOOD, George, Esq., Solicitor, aged 47.

30th. JUDGE, T. G., Esq., Solicitor, aged 51.

31st. SHOARD, J., Esq., Solicitor, aged 32.

### *November.*

2nd. HOOLE, Francis, Esq., Solicitor, aged 69.

5th. HULME, J. Hilton, Esq., Solicitor.

5th. WATKINS, J. Gregory, Esq., Barrister-at-Law, aged 32.

6th. WALKER, John, Esq., Q.C., aged 74.

13th. PRITCHARD, Henry, Esq., Barrister-at-Law, aged 31.

13th. TIBBITTS, Frank, Esq., Solicitor, aged 45.

16th. GREGORY, J. Philip, Esq., Barrister-at-Law.

16th. BEST, W. Mawdesley, Esq., Barrister-at-Law.

18th. IFILL, Benjamin, Esq., Barrister-at-Law.

20th. WORMALD, William, Esq., Solicitor, aged 48.

22nd. SMALLRIDGE, Charles, Esq., Solicitor, aged 69.

24th. WALESBY, Joshua, Esq., Solicitor.

24th. NICHOLL-CARNE, R. C., Esq., Barrister-at-Law, aged 63.

27th. BURCHAM, T. Barrow, Esq., Stipendiary Police Magistrate, aged 62.

- 27th. HOOKER, Edward, Esq., Solicitor, aged 77.  
28th. BLOOME, Matthew, Esq., Solicitor.  
28th. SWELL, E. H. T., Esq., Barrister-at-Law, aged 28.

*December.*

- 1st. LAWTON, George, Esq., Solicitor, aged 90.  
1st. YOUNG, Henry, Esq., Solicitor, aged 72.  
7th. ROSE, J. Randolph, Esq., Solicitor.  
9th. BASEVI, Nathaniel, Esq., Barrister-at-Law, aged 77.  
9th. REMER, Joseph, Esq., Solicitor, aged 58.  
10th. SHUGAR, George, Esq., Solicitor, aged 42.  
13th. THOMPSON, Richard, Esq., Solicitor, aged 59.  
13th. ELLISON, Peregrine G., Esq., Solicitor, aged 82.  
13th. BAINBRIDGE, William, Esq., Barrister-at-Law, aged 60.  
16th. JACOBS, Henry, Esq., Solicitor, aged 79.  
16th. WILLIAMS, Robert, Esq., Solicitor, aged 38.  
17th. BRADFIELD, J. Edwin, Esq., Junior, Solicitor, aged 28.  
24th. CRIGHTON, A. Clifford, Esq., Solicitor.  
24th. ELDRIDGE, William, Esq., Barrister-at-Law, aged 67.  
28th. JACKSON, G. F., Esq., Solicitor, aged 33.

*January.*

- 1st. WATTS, A. Eugene, Esq., Solicitor.  
2nd. MOORE, Richard, Esq., Solicitor, aged 49.  
2nd. CLARKE, Rupert, Esq., Solicitor, aged 61.  
2nd. DEARDEN, T., Ferrand, Esq., Solicitor, aged 67.  
3rd. ABRAHAM, George F., Esq., Solicitor, aged 88.  
5th. BULLAR, Henry, Esq., Barrister-at-Law, aged 54.  
9th. PRATT, J. Tidd, Esq., Barrister-at-Law, and Registrar of  
Friendly Societies, aged 72.  
11th. DUCKETT, T. Morton, Esq., Barrister-at-Law, aged 52.  
12th. ELMERS, Thomas, Esq., Barrister-at-Law, aged 40.
-





